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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

CITY OF BIRMINGHAM, MICHIGAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Petitioner Can Be Charged With Purposeful Intent To Discriminate, In Violation Of The Civil Rights Act Of 1968, Title VIII (The Fair Housing Act), 42 U.S.C. §§ 3604(a) And 3617, Where Evidence Is Produced Showing Non-Discriminatory Reasons for Petitioner's Actions, Absent Evidence of Pretext?

II. Whether Petitioner Can Be Charged With Purposeful Intent To Discriminate, In Violation Of The Civil Rights Act Of 1968, Title VIII (The Fair Housing Act), 42 U.S.C. §§ 3604(a) And 3617, Based, In Part, On The Speculative Finding That Voters In A Public Referendum Were Racially Motivated?

III. Whether Petitioner Can Be Charged With Purposeful Intent To Discriminate, In Violation Of The Civil Rights Act Of 1968, Title VIII (The Fair Housing Act), 42 U.S.C. §§ 3604(a) And 3617, On The Finding Of An Awareness That The Actions Of City Officials Would Collaterally Serve The Ends Of Some Citizens Who Opposed The Development Of Low Income Family, Subsidized Housing Because Of Race?

IV. Whether Petitioner Can Be Charged With Purposeful Intent To Discriminate, In Violation Of The Civil Rights Act Of 1968, Title VIII (The Fair Housing Act), 42 U.S.C. §§ 3604(a) And 3617, Based On Inadmissible Evidence Which The District Court, In Part, Characterized As Hearsay And Irrelevant?

INDEX

	Page
Opinions And Orders Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	8
1. The Decision Below Conflicts In Principle With Decisions Of This Court And Other Courts Of Appeals	8
The Evidence of Non-Discriminatory Reasons For Petitioner's Opposition To The MSHDA Low Income Family Housing Scheme, Absent Evidence Of Pretext, Precludes A Finding Of Purposeful Disciminatory Intent	8
The Motivation Of The Electorate In A Public Referendum Is Not A Proper Subject For Judicial Inference	12
Discriminatory Purpose Cannot Be Founded On Intent As An Awareness Of Consequences.	16
2. The Conclusion That Petitioner Pursued An Official Course Of Conduct With Unlawful Discriminatory Intent, Bottomed On Inadmissible Evidence Which The District Court Itself Characterized, In Significant Part, As Hearsay And Irrelevent, Is Clearly Erroneous	18
Conclusion	23
Appendix A	1a
Appendix B	21a
Appendix C	25a
Appendix D	50a
Appendix E	60a

TABLE OF AUTHORITIES

Cases: Page

Acevedo v. *Nassau County, New York*, 369 F. Supp. 1384 (E.D. N.Y. 1974), 500 F.2d 1078 (2nd Cir. 1974) 9, 16, 23

Board of Trustees of Keene State College v. *Sweeney*, 439 U.S. 24 (1978) 11

Boulden v. *Holman*, 394 U.S. 478 (1969) 18

Citizens Committee For Faraday Wood v. *Lindsay*, 362 F. Supp. 651 (S.D. N.Y. 1973), *aff'd.*, 507 F.2d 1065 (2nd Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). 11

Crawford v. *Board of Education of Los Angeles*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) 15

Crawford v. *Board of Education of Los Angeles*, 458 U.S. 527 (1982) 15

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 18

Hunter v. *Erickson*, 397 U.S. 385 (1969) 14

International Air Industries, Inc. v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) 23

Inventive Music Ltd. v. *Cohen*, 617 F.2d 29 (3rd Cir. 1980) 22

James v. *Valtierra*, 402 U.S. 137 (1971) 12

Marable v. *H. Walker & Associates*, 644 F.2d 390 (5th Cir. 1981) 10

Palmer v. *Thompson*, 403 U.S. 217 (1971) 11

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 17

Phillips v. *Hunter Trails Community Ass'n.*, 685 F.2d 184 (7th Cir. 1982) 10

Robinson v. *12 Lofts Realty, Inc.*, 610 F.2d 1032 (2nd Cir. 1979) 10

TABLE OF AUTHORITIES—(Cont'd)

Cases: Page

Smith v. *Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976) 10

Southern Alameda Spanish Speaking Organization v. *City of Union City, California*, 424 F.2d 291 (9th Cir. 1970) 15

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 11

United States v. *Brown*, 548 F.2d 1194 (5th Cir. 1977) 22

United States v. *City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982), *aff'd.*, _____ F.2d _____ (6th Cir. 1984) 1, 2, 7, 10, 12, 13, 14, 16, 20, 22

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 10, 17

Yarborough v. *City of Warren*, 383 F. Supp. 676 (E.D. Mich. 1974) 15

United States Statutes:

62 Stat. 928 (1948), 28 U.S.C. §1254(1) 2

78 Stat. 253 (1964), 42 U.S.C. § 2000e, *et seq.* (Civil Rights Act of 1964, Title VII), as amended 10

82 Stat. 81 (1968), 42 U.S.C. §3601, *et seq.* (Civil Rights Act of 1968, "Fair Housing Act") 2, 23

82 Stat. 83 (1968), as amended 88 Stat. 729 (1974), 42 U.S.C. §3604(a) (Civil Rights Act of 1968, "Fair Housing Act") 2, 7, 8

82 Stat. 88 (1968), 42 U.S.C. §3613 (Civil Rights Act of 1968, "Fair Housing Act") 2, 3

82 Stat. 89 (1968), 42 U.S.C. §3617 (Civil Rights Act of 1968, "Fair Housing Act") 3

In The
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, City of Birmingham, Michigan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on February 8, 1984.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix D hereto.

The Memorandum Opinion and Judgment of the United States District Court for the Eastern District of Michigan is reported at 538 F. Supp. 819 (E.D. Mich. 1982) and appears in Appendix A and B hereto. The supplemental Memorandum setting forth Findings Of Fact And Conclusions Of Law issued June 9, 1982, by the District Court is not reported and appears in Appendix C hereto.

The Judgment as modified pursuant to the opinion of the Court of Appeals appears in Appendix E hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 8, 1984. This Petition For Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1968, Title VIII, 42 U.S.C. §3601, *et seq.*:

§3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin.

* * *

§3613. Enforcement by Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint, preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to th full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or

persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

* * *

§3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

STATEMENT OF THE CASE

The Petitioner, City of Birmingham, Michigan, is a community of approximately 22,000 residents. The City Commission, consisting of seven (7) elected members, is the governing body of the City.

In 1974 the Petitioner purchased a vacated school site adjacent to the City's central business district. A portion of this site was to be used for parking to serve the central business district and a portion was intended to be used for the development of a senior citizen housing facility to meet the needs of the City's elderly residents. A group of local citizens, affiliated with four local churches, formed a non-profit corporation, called Baldwin House Corporation (''Baldwin House''), for the sole purpose of developing senior citizen housing on the City-owned site. Neither Baldwin House nor the Petitioner planned or desired to develop any kind of housing other than a senior citizen housing facility to serve the needs of the local community.

Baldwin House proposed to construct a 152 unit senior citizen housing facility on the City-owned site. Construction was to be financed through the Michigan State Housing Development Authority (''MSHDA''), a state housing financing agency, with rental subsidies to be provided under

the Section 8 program of the United States Department of Housing and Urban Development ("HUD"). As a condition of financing the construction, MSHDA required that minority occupancy goals be established for the senior citizen housing facility. The projected minority occupancy goal was 16% (i.e., 24 of the 152 units).

At public City Commission meetings the residents of the City were apprised of the Bladwin House proposal for development of the senior citizen housing facility, including the fact that there would be minority occupancy goals established for the project. Petitioner, pursuant to requirement of City ordinance, then sought voter approval to sell a portion of the City-owned site for the expressed and limited purpose of developing senior citizen housing. The citizens overwhelmingly approved the City's sale of said property for the purpose of construction of a senior citizen housing facility. The voters were not informed that the Baldwin House proposal envisioned anything other than a racially integrated senior citizen housing facility.

In December, 1976, the Petitioner entered into an agreement with Baldwin House which provided that the City would sell a part of the City-owned site to Baldwin House, for the sum of $250,000, for a senior citizen housing development. The agreement for sale was conditioned on Baldwin House obtaining financing which was mutually satisfactory to Petitioner, within one year. The agreement also provided that the Petitioner would "consider" such existing rehabilitated and/or new housing as MSHDA and/or HUD might "reasonably require" as a condition of financing the senior citizen housing. The agreement further required that Baldwin House make the proposed housing available without regard to "race [or] color".[1]

MSHDA had theretofore provided financing for a number of senior citizen housing projects similar to the Baldwin House proposal. Approximately seven months after Baldwin House submitted its application for financing,

[1] The Petitioner adopted a fair housing ordinance in 1967 prohibiting discrimination on the basis of race or color.

however, MSHDA advised that it had adopted a new policy and would not provide financing for construction of the senior citizen housing unless one (1) unit of low income family housing was developed within the city for every two (2) units of the proposed senior citizen housing. MSHDA candidly admitted that this policy was intended to compel the development of low income family housing, without regard to local community need or desire, by using the financing authority for elderly housing as a "carrot".

When MSHDA announced that it would not finance construction of the senior citizen housing project unless 75 units of low income family housing were also developed within the City, some community opposition surfaced. Community opposition was directed at the MSHDA imposed requirement for 75 units of low income family housing as a condition for financing the senior citizen housing. While citizens' statements of opposition to the MSHDA scheme were diverse, the evidence shows, and the District Court found, that the dominant concern was that development of low income family, subsidized housing might lower property values.[2] Other concerns expressed were a distrust of MSHDA, reports of bad experience of other communities with low income family housing, fear that construction of multiple-unit low income housing units would not blend into existing neighborhoods and would create a mini-ghetto, that the citizens should have a right to vote on the change in plan from a senior citizen housing only project, that City-owned property was going to be used to develop a housing facility that would not benefit residents of the City and the matter of minority occupancy goals.

The City Commissioners, despite some citizen opposition, sought, in cooperation with Baldwin House, to satisfy MSHDA's edict for the development of low income family housing as a condition for financing the senior citizen housing. The Petitioner and Baldwin House made

[2] Appendix, page 8a; 538 F. Supp. at 824.

three proposals to MSHDA for the development of low income housing within the City, each of which was rejected by MSHDA. The crux of the matter was that MSHDA insisted that the low income family housing include some new construction of multiple-unit dwellings. The City Commissioners, however, wanted to provide the low income family housing by acquiring and rehabilitating existing scattered site dwellings in order to blend the low income family housing into existing neighborhoods. Petitioner twice extended its agreement with Baldwin House for the sale of the City-owned property for a senior citizen housing facility in the hope that Baldwin House and the Petitioner could work things out with MSHDA vis-a-vis low income family housing.

In February, 1978, 18 months after Baldwin House submitted its application to MSHDA for financing the senior citizen housing, and with the senior housing development still an inchoate proposal, the City Commissioners determined to conduct an advisory referendum at the next general election, in April, on the question of whether the citizens favored the MSHDA proposed scheme for development of both senior citizen and low income family housing. As noted hereinbefore, when the citizens voted approval of the sale of the City-owned property for development of the senior citizen housing it was not tied to the development of low income family housing within the City. As one City Commissioner put it, the people asked for a right to vote on the matter and "that's the way we do things in the United States".

Prior to the April 3, 1978, general election the customary campaigning which occurs under a democratic form of government was evident. Some citizens spoke out in favor of, and circulated flyers in support of, the MSHDA financed scheme for development of both senior citizen and low income family housing. Others spoke out against, and circulated flyers in opposition to, the MSHDA financed scheme. Also, in the election three persons opposed the three incumbent City Commissioners who were up for re-

election and who supported the development of both the senior citizen and low income family housing to satisfy MSHDA. A majority of those voting (4,564 to 1,772) voted against the MSHDA scheme for development of both senior citizen and low income family housing, which scheme involved the sale of City-owned property. The three incumbent City Commissioners were defeated in their bid for re-election.

After the April 3, 1978, election, neither Baldwin House nor the Petitioner pursued the MSHDA financed housing proposal. In May, 1978, the three remaining City Commissioners who supported the development of low income family housing in an effort to secure MSHDA financing for the senior citizen housing were recalled from office in a special election.

The District Court found that six (6) of the seven (7) City Commissioners supported Baldwin House and that none of the six acted out of a desire to discriminate against black people (Appendix, p. 9a; 538 F. Supp. at 825). The District Court, however, inferred that some unknown number of the 22,000 residents of the City opposed the proposed MSHDA financed housing scheme for racial reasons and held that because the City Commissioners were aware that their refusal to accede to the MSHDA demands for the development of low income family housing, as a condition for financing the senior citizen housing, would appease such citizens, the Petitioner is chargeable with purposeful racially discriminatory intent in violation of the Fair Housing Act, 42 U.S.C. §3604(a). The Court of Appeals, in a "rubber stamp" opinion, affirmed the holding of the District Court but, in accord with the contention of both Petitioner and Respondent, modified the injunctive order of the District Court to the extent said order exceeded its remedial authority.

The decisions below erroneously equate opposition to low income family housing with racial opposition,[3] and in

[3] The evidence of record shows that a majority of the families earning less than 125% of poverty level income in the SMSA in which Petitioner is situated are white.

effect hold that once the City decided to sell its property for development of a senior citizen housing development, it was required by the Fair Housing Act, 42 U.S.C. §3604(a), to agree to the utilization of its property as a vehicle to satisfy the administrative whim of a state housing agency (MSHDA) to compel the development of low income family, subsidized housing units in such numbers and in such form as MSHDA dictated.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Evidence Of Non-Discriminatory Reasons For Petitioner's Opposition To The MSHDA Low Income Family Housing Scheme, Absent Evidence Of Pretext, Precludes A Finding Of Purposeful Discriminatory Intent.

In order to violate the Fair Housing Act, a housing practice covered under 42 U.S.C. §3604(a) must be pursued "because of" race, color, religion, sex or national origin. Thus, where, as here, the evidence plainly shows legitimate, non-discriminatory reasons for the challenged action, and such non-discriminatory reasons are not shown to be pretextual, there is no basis for a judicial finding of purposeful discriminatory intent.

The evidence in this case shows that there was no citizen or Petitioner opposition to the City initiated proposal for sale of the city's property for development of a racially integrated, senior citizen housing facility to be financed by MSHDA. The fact that such project would have been subject to minority occupancy goals was of no concern. Opposition surfaced only after MSHDA announced that it would not provide financing for the proposed senior citizen housing unless Petitioner and Baldwin House agreed to develop one unit of low income family housing, within the City, for each two units of the proposed senior citizen housing.

The evidence shows that those citizens who opposed the MSHDA edict for development of low income family housing, as a condition for financing the senior citizen housing, did so for a number of reasons, as follows:

(a) Fear that low income family housing might result in a lowering of property values.

(b) Distrust or suspicion of MSHDA.

(c) People didn't understand the whole thing.

(d) Reports of bad experiences of other communities re: low income family housing.

(e) New construction of multiple unit low income family housing would not blend low income families into existing neighborhoods and would create a mini-ghetto.

(f) The people had the right to vote on the change in plan from a senior citizen housing development only to a senior citizen housing and low income family housing development.

(g) Concern that the City-owned property was being used to develop housing which would not benefit City residents.

(h) Minority occupancy goals.

The residents of the City are not on trial. Assuming, *arguendo*, that some citizens were opposed to the low income family housing proposal for racially inspired reasons, such fact is relevant only if accompanied by proof of discriminatory purpose by official conduct of Petitioner. *Acevedo* v. *Nassau County, New York*, 369 F. Supp. 1384, 1389 (E.D. N.Y. 1974), *aff'd.*, 500 F.2d 1078 (2nd Cir. 1974). The evidence clearly shows non-discriminatory reasons for the official conduct of Petitioner.

As stated hereinbefore, the City Commission's opposition to the MSHDA proposed low income family housing scheme was based on its desire to provide such housing by

rehabilitation of existing scattered site dwellings as opposed to MSHDA's demand for new construction of multi-family housing. The District Court's opinion acknowledges said fact—

> . . . The Commission consistently sought to avoid any requirement for new construction of low-cost family housing.
>
> Appendix, page 4a; 538 F. Supp. at 823.

There is no evidence that this non-discriminatory reason for Petitioner's challenged action was pretextual.

In *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 252, 271, n. 21 (1977), this Court stated that even where there is proof that a defendant was motivated in part by racially discriminatory purpose, such proof would not necessarily establish a violation of the Equal Protection Clause. The Court held that if evidence was produced showing that the same decision would have resulted even had the impermissible purpose not been considered, then the challenged decision could not be attributed to improper consideration of a discriminatory purpose. The evidence in this case plainly shows that the diverse, non-discriminatory reasons underlying Petitioner's challenged actions would have obtained the same result had the asserted impermissible purpose not been considered.

The Courts of Appeals that have addressed the burden and allocation of proof in intentional discrimination cases under the Fair Housing Act have followed the same evidentiary approach developed by this Court in disparate treatment cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*[4] Thus, a plaintiff who alleges intentional racial discrimination in housing must meet the initial burden of establishing a prima facie case. If

[4] *Marable* v. *H. Walker & Associates*, 644 F.2d 390, 397 (5th Cir. 1981); *Phillips* v. *Hunter Trails Community Ass'n.*, 685 F.2d 184, 190 (7th Cir. 1982); *Robinson* v. *12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039 (2nd Cir. 1979); *Smith* v. *Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976).

the plaintiff establishes a prima facie case and defendant produces evidence articulating—not proving—a legitimate, non-discriminatory reason for his action, the plaintiff must prove that the proffered non-discriminatory explanation for defendant's action is a pretext. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978). Here there is no evidence, and no finding, that the non-discriminatory reasons offered for Petitioner's official conduct were a pretext for racial discrimination.

In *Palmer* v. *Thompson*, 403 U.S. 217, 224-225 (1971), this Court stated that it is difficult or impossible to determine the motivation behind the choices of public officials in their official conduct. The following holding in *Citizens Committee For Faraday Wood* v. *Lindsay*, 362 F. Supp. 651, 655 (S.D. N.Y. 1973), affirmed by the Court of Appeals for the Second Circuit, 507 F.2d 1065 (2nd Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), is equally apropos to the instant case:

> . . . Furthermore, a political response to community opposition[5] is not automatically evidence of racial discrimination by public officials in response to racially based opposition in the community. On the record in this case, the plaintiffs have not established that racial motives underlay the community opposition to the project; therefore, to the extent that the inaction of the HDA was a response to community concerns, no racially discriminatory motives can be imputed to it. *That there was some racial opposition does not mean that opposition on other grounds was not the overriding community sentiment or the nature of the opposition to which the administration responded.*
> Emphasis added.

Affirmance of the District Court decision in the face of evidence showing non-discriminatory reasons for Petitioner's challenged actions, absent any evidence or find-

[5] I.e., opposition to low income family housing.

ing of pretext, conflicts with decisions of this Court and other Courts of Appeals and warrants the granting of certiorari to review the judgment below.

The Motivation Of The Electorate In A Public Referendum Is Not A Proper Subject For Judicial Inference.

Among the facts upon which the courts below planted an inferential finding that Petitioner acted with racially discriminatory intent is the City Commission's decision to hold an advisory referendum on the matter of the proposed MSHDA low income family housing scheme.[6] The referendum question did not make any reference to, or rest upon, any distinctions based on race. The question posed was simply whether the voters favored financing the proposed senior citizen housing, which involved the sale of City-owned property, through MSHDA with MSHDA's concomitant requirement for development of low income family housing units within the City.

To a citizen living under a democratic form of government, a judicial finding that allowing citizens to vote on a matter that affects the future development and character of the community in which they live demonstrates racially discriminatory purpose is shocking. Moreover, such a finding is in conflict with the holding of this Court in *James* v. *Valtierra*, 402 U.S. 137, 141 (1971), involving a challenge to a public referendum on the matter of low income housing, wherein the Court stated that—

> . . . Provisions for referendums demonstrate devotion to democracy not to bias, discrimination or prejudice.

The Court of Appeals dodged the thorny question of judicial inquiry into the motivation of the electorate by stating that it did not read the opinion of the District Court as dependent upon the motivation of voters. A plain reading

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[6] Appendix, pages 11a and 57a.

of the District Court's opinion, however, shows that judicial speculation as to the motive of the electorate provides a substantial basis for the finding of racially discriminatory intent in this case, which finding was affirmed by the Court of Appeals. Appendix, pages 15a-16a; 538 F. Supp. at 828-829.

The Court of Appeals erroneously concluded that the facts enumerated by the district judge in a single paragraph of his ten page opinion provide the basis for the finding of racially discriminatory intent (Appendix, pages 11a-12a and 56a-57a; 538 F. Supp. at 826). Significantly, however, the District Court opinion reveals that the limited facts relied upon by the Court of Appeals are merely "[A]mong the facts" upon which the District Court holding of racially discriminatory intent is predicated. Moreover, even the truncated view of the facts as alluded to by the Court of Appeals includes the following as a basis for an inference of racially discriminatory purpose:

> . . . the defeat of three commissioners at the April 3, 1978 election and the subsequent recall of the remaining three commissioners who favored the Baldwin House proposal . . .
>
> Appendix, page 11a; 538 F. Supp. at 826.

Obviously, the electorate's decision not to return three City Commissioner's to office, and to recall three other incumbents, standing alone, does not provide a basis for an inference of discriminatory motive.[7] An inference of racial motivation in such instance can be predicated only on an inference as to the voters' motivation. Given the fact that not a single person identified as having voted in the April 3, 1978, election testified in this case, the basis for the lower courts' conclusion that the results of the election evidence racially discriminatory purpose is indeed a mystery.

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[7] Also, the conclusion of the Courts below that the voters' decision to remove the six City Commissioners from office supports a finding of official racially discriminatory conduct is a non-sequitur.

The opinion of the District Court plainly indicates a judicial probing into the motivation of the voters in the advisory referendum, held contemporaneously with the general election on April 3, 1978, to support the finding that some citizens opposed the low income family housing proposal for racial reasons, Appendix, pages 15a-16a; 538 F. Supp. at 828-829. Such judicial probing is, however, purely speculative and impermissible.

There is not a tittle of evidence as to the identity of any person, or persons, who voted in the advisory referendum. The only testimony concerning the voters or their motivation is the conclusory opinion of one of the recalled City Commissioners that the vote against the combination senior citizen and low income housing proposal "was, at least in part, racially motivated". Appendix, page 10a; 538 F. Supp. at 826. Despite having granted Petitioner's motion to strike this plainly inadmissible testimony, the District Court inexplicably uses it as one of the factual predicates for its finding that some citizens were racially motivated.

The District Court erroneously concluded that—

> The Supreme Court tacitly approved judicial scrutiny of the motivation of the electorate in *Hunter* v. *Erickson*, 393 U.S. 385, 392 . . . .
>
> Appendix page 15a; 538 F. Supp. at 828.

Such conclusion exhibits a misreading of the holding of this Court in *Hunter* v. *Erickson, supra*. In *Hunter* this Court held unconstitutional a city charter amendment because *on its face* the amendment drew distinctions based on race. The charter amendment resulted from an initiative petition and a public referendum. The Court did not license judicial inquiry into the motive of the electorate but simply held that since the charter amendment on its face placed special burdens on minorities, the fact that its genesis was a public referendum would not serve to immunize it against satisfying constitutional standards.

In *Southern Alameda Spanish Speaking Organization (SASSO)* v. *City of Union City, California*, 424 F.2d 291, 295 (9th Cir. 1970), the court held that the alleged motivation of the electorate in voting to repeal a zoning change, which nullified a proposed low income government subsidized housing project, could not provide a basis for finding racially discriminatory motivation. The court stated that—

> If the voters' purpose is to be found here, then, it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.

In *Crawford* v. *Board of Education of Los Angeles*, 113 Cal.App.3d 633, 170 Cal. Rptr. 495 (1980), the voters approved a state constitutional amendment to prohibit the mandatory busing of students to remedy *de facto* segregation. The California appellate court summarily rejected the contention that the voters were motivated by racially discriminatory purpose, stating:

> . . . We think it *pure speculation* to suppose that voters who supported Proposition 1's restrictions on mandatory school assignment were motivated by specific intent to effect racial segregation and by discriminatory intent.
>
> 113 Cal.App.3d 633 at 635. Emphasis added.

This Court concurred, stating that it would not "impugn the motives of the State's electorate". *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527, 545 (1982).

The motivation of the electorate is not only impossible to ascertain, but it is not a proper subject for judicial inquiry. *Yarborough* v. *City of Warren*, 383 F. Supp. 676, 683 (E.D. Mich. 1974). The decisions below are plainly

founded, in part, on judicial speculation as to the motive of the electorate. This speculative judicial intrusion into the privacy of the franchise calls for the grant of certiorari to review the judgment below.

Discriminatory Purpose Cannot Be Founded On Intent As An Awareness Of Consequences.

The District Court held—

> . . . The government need not prove that the Commission itself intended to discriminate on the basis of race in order to establish that the City acted with a racially discriminatory intent. In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind the desires, and that members of the decision-making body *were aware* of the motivation of the private citizens. . . .
>
> Appendix, page 14a; 538 F. Supp at 828. Emphasis added.

The Court of Appeals affirmed the District Court without comment on the above-quoted holding.

As stated in *Acevedo* v. *Nassau County, New York*, 500 F.2d 1078, 1082 (2nd Cir. 1974):

> The Fair Housing Act does not impose any duty on a governmental body to construct or "to plan for, approve and promote" any housing.

Thus, Petitioner was not obliged to go forward with its plan to sell the City-owned property to Baldwin House for a senior citizen housing development when MSHDA conditioned its financing of the senior citizen housing project on the development of low income family housing within

the City. Petitioner's concern over MSHDA's attempt to force the development of low income family housing within the City, as a condition of financing the proposed senior citizen housing, was legitimate, rational and racially neutral.[8]

A finding that the City Commissioners were *aware* that their actions would collaterally serve the ends of some racially motivated citizens cannot be used as a legal linchpin for inferring official invidious racial purpose. In *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279, n. 25 (1979), this Court rejected such reasoning, holding that an inference is "not a synonym for proof". In *Feeney* the Court stated that discriminatory intent cannot be founded on intent as an awareness of consequences, stating:

> "Discriminatory purpose", however, implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group.

The District Court found (Appendix, page 9a; 538 F. Supp. at 825), that the evidence shows that six of the seven City Commissioners did not act out of a desire to discriminate against black people. There is no proof that any official conduct of Petitioner was pursued "because of" the racial concerns of any persons. Here, as in *Village of Arlington Heights*, *supra*, 429 U.S. at 269, evidence that some citizens were motivated by opposition to minority groups does not warrant the conclusion that this motivated the Petitioner.

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[8] The effect of the collapse of the inchoate proposal for the senior citizen and low income family housing fell 5 times more harshly on whites than on minorities.

The erroneous planting of an ultimate inference of official discriminatory purpose on an awareness of some citizen racially inspired motivation warrants the grant of certiorari to review the judgment below.

2. THE CONCLUSION THAT PETITIONER PURSUED AN OFFICIAL COURSE OF CONDUCT WITH UNLAWFUL DISCRIMINATORY INTENT, BOTTOMED ON INADMISSIBLE EVIDENCE WHICH THE DISTRICT COURT ITSELF CHARACTERIZED, IN SIGNIFICANT PART, AS HEARSAY AND IRRELEVANT, IS CLEARLY ERRONEOUS.

The ultimate conclusion of the decision below, that the official conduct of Petitioner was based on intentional discriminatory purpose, is bottomed on inadmissible evidence which the District Court itself, in significant part, stated is "hearsay" and "irrelevant".

Petitioner is aware of this Court's "two court rule" pursuant to which it is settled practice to accept factual determinations in which the District Court and the Court of Appeals have concurred. Error should not, however, be sanctified by repetition. The "two court rule" does not preclude this Court from making an independent study of the record to determine whether the findings below are clearly erroneous. *Boulden* v. *Holman*, 394 U.S. 478, 480-481 (1969). Where, as here, there is obvious and exceptional error in the factual findings upon which the decision below is founded, the "two court rule" is not adhered to. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The decision below is bottomed entirely upon inference built upon inference. Although *not one person* who opposed the proposed MSHDA financed low income family housing scheme testified in this case, the decision below infers from hearsay evidence that some significant number

of 22,000 residents of the City opposed such scheme for racial reasons. Based on such inference the decision below then infers that because the City Commissioners were aware of some citizen racially motivated opposition, Petitioner's disagreement with MSHDA over the proposed low income family housing scheme was predicated on purposeful discriminatory intent.

The finding of "significant citizen" racially motivated opposition to the proposed MSHDA financed low income family housing scheme is based on three (3) so-called "flyers" stating opposition to the subject housing scheme, five (5) letters from individual citizens stating their views with regard to the subject housing scheme and the testimony of four of the seven former City Commissioners as to what some unidentified and unknown number of citizens said to them, or in their presence.

With respect to the flyers, the uncontroverted evidence shows that the author, or authors, are unknown. The number and identity of those persons who supported the views expressed in the flyers is unknown, and that the extent to which the flyers were reproduced, distributed, received and read is also unknown. When one of these flyers was offered in evidence, assertedly to show the basis for "community" opposition, Petitioner's counsel made objection thereto and the District Court stated—

> THE COURT (Interposing): This is not going to prove that at all [i.e., the basis for community opposition] . . . the contents of that is totally meaningless and I am not going to receive it. The objection is sustained.
>
> . . . it makes no sense to put another ten pages of nonsense in.
>
> Transcript of record, August 31, 1981, p. 133.

The District Court acknowledged on the record that the flyers are "hearsay" and stated that if they were not

offered for the truth of the matter asserted they had no relevancy. Nonetheless, the flyers were admitted in evidence on the grounds that the City Commissioners had read them. These inadmissible "hearsay" flyers are used as a building block for the inferential finding that Petitioner is chargeable with purposeful discriminatory intent.

The decisions below are also based, in part, on theorizing that letters written to the City Commissioners by five (5) of the City's 22,000 residents exhibit community-wide racially inspired opposition to the proposed MSHDA financed low income family housing scheme.[9] Petitioner's counsel objected to the admission of these letters in evidence on the grounds that they were hearsay and of no probative value. The District Court made the following statements with respect to said letters:

> THE COURT (interposing): . . . Now, to begin putting in letters from citizens in favor of or opposing family housing in the City of Birmingham is not going to establish very much.
>
> Transcript of Record, August 31, 1981, pp. 116-117.
>
> * * *
>
> THE COURT: . . . It is total hearsay of no value whatever.
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> Transcript of Record, August 31, 1981, p. 118.
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> * * *
>
> THE COURT: The letters seem to the Court to be totally irrelevant.
>
> Transcript of Record, September 1, 1981, p. 32.

Despite his statements of record that the five (5) citizens' letters are "total hearsay of no value whatever" and "totally irrelevant", the district judge admitted them in

[9] Appendix, page 10a; 538 F. Supp. at 826. Letters from five (5) of 22,000 residents (i.e., .0002%) hardly show the motivations of any meaningful segment of the population.

evidence, over objection, on the grounds that the City Commissioners read them.[10] These letters are used as a foundational plank for the inference that Petitioner is chargeable with racially discriminatory intent.

The purely speculative inference that some "significant" number of private citizens opposed the proposed low income family housing development for racial reasons serves as the building block for the ultimate inference of racially discriminatory intent against Petitioner. This speculative inference is predicated, in significant part, on purely hearsay testimony as to what some unidentified and unknown number of persons stated to, or in the presence of, some of the City Commissioners.

Not one citizen who opposed the development of low income family housing testified in this case. The totality of evidence of expressed citizen opposition, or support, for the proposed development of low income family housing derives from the testimony of four of the seven City Commissioners in office at times material hereto. One of these four witnesses testified that she could not "speculate" on the motivation of persons who opposed the development of low income family housing. Another of these four witnesses testified that the number of people whom he heard express racially based opposition was "insignificant".

Two of the four former City Commissioners, however, testified as to what some unknown number of citizens, none of whom they could identify, said to them or in their presence. These out of court statements were admitted for the truth of their assertions and used to support a finding of racially discriminatory intent.

The plainly hearsay, untrustworthy, prejudicial and inadmissible character of the testimony upon which an ulti-

[10] The record shows that the City Commissioners routinely read all letters sent to them.

mate finding of racially discriminatory intent is based is illustrated by the testimony of Herbert Ring, one of the former City Commissioners. Mr. Ring testified that he regularly attended the City Commission meetings and that he never heard any racial opposition expressed by anyone at any City Commission meeting. Respondent's counsel then asked Ring if he heard any statements in private conversations. Ring answered as follows:

> [Witness Ring] I think I can say that the majority of concerns expressed to me were in relationship to minorities coming in to reduce property values, yes.
>
> Transcript of Record, September 4, 1981, p. 116.

On cross-examination Ring stated that he didn't know how many people he talked to in these private conversations or what they actually said. Despite having lived in the City of Birmingham for 25 years, Ring testified that he could not identify a single person whom he said made a racially motivated statement to him.

Ring's testimony is that some unidentified, and unknown number of, declarants asserted that they were concerned that the subject low income family housing proposal would bring minorities into the city to reduce property values. Ring's testimony was received for the truth of the matters asserted by the out of court declarants and the findings below are based in significant measure on such testimony (Appendix, page 19a and 56a-57a; 538 F. Supp. at 830). This is a classic example of inadmissible hearsay and it was plain error to admit it in evidence. *Inventive Music Ltd.* v. *Cohen*, 617 F.2d 29, 33 (3rd Cir. 1980); *United States* v. *Brown*, 548 F.2d 1194, 1204-1205 (5th Cir. 1977).

Evidence based on hearsay statements of unidentified declarants is the worst type of hearsay and does not possess the requisite quality of trustworthiness on which to predicate judicial findings. Where the witness through whom

hearsay statements are introduced does not, or cannot, identify the declarant, the opposing party is denied any opportunity to rebut the hearsay statements. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 726, n. 36 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Findings based on such hearsay and prejudicial testimony are plainly clearly erroneous.

The record in this case is not voluminous and it is respectfully submitted that an independent examination of said record by this Court is called for and that such examination will lead this Court to conclude that the findings below are clearly erroneous.

CONCLUSION

The decision below presents issues of imperative public importance that call for review by this Court. There are literally thousands of local units of government in the United States which, under the decision below, face the peril of being charged with racially discriminatory intent if they initiate a housing plan and withdraw therefrom, despite non-discriminatory reasons for so doing.

The decision below represents a perversion of the plain purpose underlying the Fair Housing Act. Said Act was intended to remove invidious obstacles to the acquisition of housing. There is nothing in the Act, however, which requires a local community to bend to the will of a governmental agency which arbitrarily seeks to use its funding authority to coerce development of low income family housing which a local community neither needs nor desires. *Acevedo* v. *Nassau County, New York*, 500 F.2d 1078, 1082 (2nd Cir. 1974).

For the reasons hereinabove stated, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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Dated: May 7, 1984

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. Civil No. 80 70991

CITY OF BIRMINGHAM, MICHIGAN,
Defendant.

MEMORANDUM OPINION

(FINDINGS OF FACT
CONCLUSIONS OF LAW)

Appendix A

MEMORANDUM OPINION

The Department of Justice filed this suit alleging that the City of Birmingham engaged in a policy and practice that prevented Baldwin House Corporation (Baldwin House) from developing in that City racially integrated low-income senior citizen and family housing in violation of Sections 804(a) and 817 of the Civil Rights Act of 1968 (the Fair Housing Act), 42 U.S.C. §§ 3604(a) and 3617.[1] The complaint alleges several separate acts of the City, which interfered with Baldwin House's negotiations for the construction of low-income family housing. The government contends that this intentional interference with the Baldwin House proposal "otherwise made unavailable" housing to black families in violation of the Act. We find that the evidence fairly preponderates in support of the government's allegations. For the reasons stated, we grant judgment in favor of the plaintiff on the issue of liability.

The City of Birmingham was aware of its acute need for senior-citizen housing as early as 1969. In the Summer of 1975, the City invited interested parties to submit a proposal for the design, construction and management of a senior-citizen housing project planned by the City on the recently acquired Baldwin School site. The City officials accepted the proposal submitted by Baldwin House, a non-profit corporation formed by members of five different Birmingham churches. The Baldwin House proposal provided for construction of 156 units (later reduced to 152) of senior-citizen

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[1] 42 U.S.C. § 3604(a) makes it unlawful "to refuse to sell or rent after the making of a bonafide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex or national origin." (Emphasis added.) Any conduct or practice that prevents or limits construction of housing is included within the scope of the phrase "otherwise make unavailable or deny." *Metropolitan Housing Development Corporation* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) *(Arlington Heights II)*.

Section 817 of the Act, 42 U.S.C. § 3617, makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected" by the Act.

housing to be financed by the Michigan State Housing Development Authority (MSHDA). Baldwin House further planned to apply for tenant rent subsidies under HUD's Section 8 New Housing Program.

On December 6, 1976, Birmingham entered into an agreement for the sale to Baldwin House of the former Baldwin School site.[2] Paragraph I(G) of the agreement provided:

> The City acknowledges that federal and state policy requires that non-elderly government assisted housing as well as assisted elderly housing be provided in each housing market area. Therefore, the City agrees it will consider such existing, rehabilitated and/or *new housing* as the Michigan State Housing Development Authority and/or U.S. Department Housing and Urban Development shall reasonably require as a condition of providing financing and assistance to the Baldwin House project.

The agreement gave Baldwin House one year to obtain MSHDA financing. Thus, prior to signing the agreement, the City Commission knew that MSHDA would require some "family housing" as a condition for financing the construction of senior-citizen housing. City officials also knew that MSHDA would probably require some new construction of family housing.

On February 25, 1977, Baldwin House submitted its first request to MSHDA for financing the construction of family housing (50 units on one site with a possible additional 10 units on a second site). In March 1977, less than 90 days after the City signed its agreement with Baldwin House, MSHDA officials informed Mr. Watchowski, the City Grant Administrator, that, as part of its newly announced balanced housing

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[2] The sale of the Baldwin School site required voter approval. A referendum seeking voter approval was scheduled for April 5, 1976. The proposition submitted to the voters specified that the school site would be used for senior-citizen housing. The sale was overwhelmingly approved by the voters.

policy, MSHDA would require one unit of low-income family housing for every two units of senior-citizen housing as a condition for financing construction of senior-citizen housing. The MSHDA made it clear that this 2-for-1 ratio merely added a numerical goal to its balanced housing policy and was negotiable. Prior to March 1977, MSHDA's balanced housing policy had never been spelled out formally in any written document. As a matter of fact, there is evidence that MSHDA had not applied its balanced housing policy uniformly throughout the state. Moreover, in March 1977, it was not clear that MSHDA would insist on *new* construction of low-income family housing as part of its balanced housing policy.

This 2-for-1 ratio was discussed at an April 1977 Commission meeting. Mayor Dorothy Conrad suggested that the Commission inform the public of MSHDA's recently announced policy.[3] A public hearing was scheduled for May 12, 1977. On this date, the Commission began to actively participate in all of the negotiations between Baldwin House and MSHDA. The Commission consistently sought to avoid any requirement for new construction of low-cost family housing. On May 12, 1977, the Commission passed a resolution directing Baldwin House to explore the possibility of meeting MSHDA's balanced housing policy through the acquisition and rehabilitation of existing homes.[4] And later, at its May 31, 1977 meeting, the Commission directed Baldwin House to submit a proposal agreeing to meet MSHDA's family housing requirement by the purchase and rehabilitation of 14 existing homes. The Commission believed that these 14 homes, when

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[3] Prior to April 1977, the City Commission did not publicize any of Baldwin House's proposals to meet MSHDA's balanced housing requirement.

[4] To assist Baldwin House in putting this proposal together, Mr. Watchowski provided Baldwin House with an inventory, prepared by the City, of Birmingham houses in need of rehabilitation. In August 1977, Baldwin House engaged Winona Stout, a real estate broker, to inspect City housing. She discovered 20 to 30 houses worth less than $35,000 in need of rehabilitation. A majority of that number was for sale.

added to the 25 units of approved Section 8 Existing Housing and the 11 HUD Section 312 rehabilitation loans taken out by City residents, should give the City credit for 50 units of family housing. The MSHDA replied to this proposal on June 24, 1977, and reminded Baldwin House that its 2-for-1 policy required 75 (not 50) units of family housing. The MSHDA further stated that it would credit Baldwin House with the 25 units of Section 8 housing, but refused to credit the City's participation in the Section 312 program. However, MSHDA did promise to consider a program of substantial rehabilitation as one method of meeting its balanced housing requirement.

Thus, it is clear that the City did interfere with Baldwin House's negotitations with MSHDA and it is equally clear that the City continued to dictate the terms of proposals Baldwin House could submit to MSHDA after May 31, 1977.[5] On July 18, 1977, the Commission directed Baldwin House to submit a proposal agreeing to supply "50 single-family, scattered site rental units" to meet MSHDA's balanced housing requirement. The MSHDA responded with a promise to review this proposal provided Baldwin House and the City would be willing to construct 25 *new* family housing units. On August 15, 1977 Baldwin House submitted a proposal for "50 single-family, scattered site rental units," and acknowledged that the program might require some *new* construction and that "25 might be a goal" for new construction.

On September 1, 1977, MSHDA informed Baldwin House that it had accepted Baldwin House's proposal for processing, and requested additional information. Generally, the acceptance of a proposal for processing reflects MSHDA's belief that the proposal has a reasonable chance of completion. On

[5] Baldwin House, a group of private citizens, did not need extensive assistance from the City to construct either senior citizen or family housing. Baldwin House only required the City to sell it the Baldwin School site and to grant a tax abatement for the site. The tax abatement was a minor concession. The school site had not been on the tax rolls for many years. Baldwin House had agreed to make an annual payment to the City in lieu of taxes.

September 14, 1977, Baldwin House provided MSHDA with the information it requested, including a copy of an unexecuted purchase agreement for a multiple-unit family housing site on Lincoln Street. Baldwin House also submitted a revised development proposal designed to meet the balanced housing requirement. It was apparent to all that MSHDA was seriously considering the Baldwin House proposal. On October 25, 1977, a MSHDA Development Fund Loan Report recommended approval of an $83,000 development loan for Baldwin House to cover initial expenses, including the right to acquire options for family-housing sites. Approval of such a loan assures an applicant that the MSHDA Board has a "reasonable anticipation" that a mortgage loan commitment will materialize. The October 1977 report contains several proposals for meeting MSHDA's family-housing requirement, including a proposal that the City favored: the rehabilitation of 50 existing homes. The final decision on the number of new and rehabilitated units would have been made prior to or at the final closing on the mortgage.

Soon after the public had been advised that Baldwin House intended to construct low-income family housing, opposition began to surface. Much of the opposition to the proposal centered on fears that family housing might introduce "harmful elements" into Birmingham. At its May 31, 1977 meeting, the Commission considered a suggestion to earmark 80% of the senior-citizen units for Birmingham residents. Commissioner Robert Kelly, the only Commissioner openly opposed to Baldwin House, stated in opposition to the 80% suggestion, "The dilution factor in the Tri-County area is 15% minority groups, you want to do more than the average dilution factor; I couldn't support that." At a Commission meeting in July 1977, Commissioner Kelly said:

> The record will show that these people in coming out here — the history of HUD and these people is to destroy. Any place they have been involved before, go to Detroit, go to any of the cities and see what they have done. In my

> opinion, they have destroyed. Why don't they take the money back there and build rather than move into another area and take 75 units, houses, private homes off the market and was not presented to the people of this community.

We find that when he spoke of "these people" Commissioner Kelly was referring to black people. We further find that Mr. Kelly was equating non-Birmingham residents with minorities and that his objection to the 80% suggestion was based on his opposition to increasing the number of black people living in Birmingham.

On October 31, 1977, the City Commission discussed the renewal of the Baldwin House contract and tentatively agreed to a nine-month extension. One week later, November 7, 1977, a group of 75 to 100 Birmingham residents led by Nancy Elby attended the Commission meeting. Part of the group became hostile and repeatedly interrupted Commissioners who tried to speak. They expressed their strong opposition to the construction of any family housing in Birmingham. They stated their concern about "those people" coming to Birmingham. They contended that construction of family housing would harm the City's neighborhoods and reduce property values. We find that when the group led by Nancy Elby referred to "those people," they were referring to black people. There is no doubt that the Commissioners present at the November 7 meeting knew that the oppposition to construction of family housing was based in part on race.

Residents who opposed the Baldwin House proposal attended every Commission meeting between November 1977 and April 1978. At the November 28, 1977 Commission meeting, Nancy Elby presented a petition, signed by a number of Birmingham residents. The group insisted that plans to build family housing be discarded and that the City conduct an advisory referendum on the Baldwin House proposal. The group also insisted that the Commission defer further consideration of the tenative agreement to extend the Baldwin

House contract until after the referendum. The group stated several reasons for its opposition. The most often-mentioned reason was the fear that construction of low-income housing might lower property values. Others voiced resentment over the intrusion into local affairs by state and federal governments. At trial, although she declined to speculate on their motivation, Commissioner Ann Dropiewski did believe that some of the concerns expressed "could well be interpreted by many to include that of racial discrimination." She testified that after the meeting, she asked Nancy Elby to be "careful" with the issue of low-income housing because she believed others could conclude that Ms. Elby was motivated by a desire to exclude black people from Birmingham.

Although the majority of the Commissioners continued to wistfully support the Baldwin House proposal, Commissioner Kelly remained adamantly opposed. On November 7, 1977, the Commission took action that supported opponents of the Baldwin House proposal. For example, they agreed to defer a final vote on extending the Baldwin House contract. In addition, they added several amendments to the proposed contract that made it impossible for Baldwin House to continue its negotiations with MSHDA. One amendment prohibited Baldwin House from acquiring possible sites for family housing until MSHDA gave its final approval for senior-citizen housing. A second amendment provided that the contract would terminate should MSHDA require Baldwin House to construct any multi-unit family housing.[6] At its November 28 meeting, the Commission amended the Baldwin House contract and then voted to extend it for merely 60 days.[7] Although

[6] By November, the Commission believed that the City's opposition had so crystalized, Mayor Conrad met with MSHDA and HUD officials in an attempt to eliminate the family housing requirement from the Baldwin House proposal. She told MSHDA that the requirement was jeopardizing the entire senior-citizen housing proposal and that opposition "is organizing all over town and fear is what is being stressed."

[7] The contract extension signed the following day included a new paragraph H which provided: "Baldwin House shall not take any steps toward acquiring any interest in or providing any type of housing other than senior-citizen housing."

six of the Commissioners supported Baldwin House and none of the six acted out of a desire to discriminate against black people, they knew that the 60-day extension and the amendments would preclude Baldwin House from negotiating successfully with MSHDA.

On February 21, 1978, the Commission agreed to an advisory referendum for the upcoming election on April 3, 1978. April 3, 1978 was a regularly scheduled election day at which three of the seven Commissioners — Ring, Staples, and Underwood — had to run for re-election. They were challenged in the election by Gary Kain, William York and George B. Jackson, admitted opponents of the Baldwin House proposal. Some of the speeches made during the campaign were direct appeals to racial prejudices. Mr. York adivsed the audience attending the League of Women Voters candidates' night meeting that the housing proposed by Baldwin House would create an economic and social mix that was "biologically wrong." Campaign literature distributed prior to the election carried the same racial theme. One flyer entitled "Vote No — No" prepared by "Birmingham Neighbors" and reprinted in the *Birmingham Patriot*, urged a vote against the Baldwin House proposal because "MSHDA/HUD would fill our senior complex with non-residents," and noted that first priority for the senior and family housing would be given to "16% minorities, potentially outside of Birmingham (in senior complex and in HUD houses equal 32 units)." The flyer then endorsed the candidacy of Messrs. York, Jackson and Kain. This flyer was discussed openly at one of the Commission meetings. The Commissioners acknowledged its racial overtones. After reading the flyer, Mayor Conrad attempted to stop further distribution in Birmingham. We find that the flyer urged rejection of the Baldwin House proposal at least in part because the proposal would increase the number of blacks living in Birmingham.

A second flyer entitled "Fact Sheet — Senior-Citizen Housing" distributed by Nancy Elby's group, described

MSHDA and HUD as agencies designed "to effect social change" and also stated "as HUD/MSHDA disclose other guidelines or quotas required for eligibility for occupancy, the true priorities will become evident, perhaps to the disadvantage of long-time Birmingham residents."[8] In addition to reading the flyers being distributed, the Commissioners heard the views of a number of Birmingham residents at meetings, in correspondence and in private conversations. A February 4, 1978 letter to Mayor Conrad spoke in opposition to Baldwin House and referred to restrictions that have been placed on subsidized housing. These restrictions had to do with dwellings "being reserved for blacks when there was not a black child in the school system." Another letter opposing the Baldwin House proposal suggested avoiding any "requirement that the City artificially alter the population makeup of the community so as to provide a diverse population pool." Still another letter characterized the attempt to construct low-income housing as "socialism." And in another letter, William Rodgers, a member of the "Alternative Financing Committee" said that he was opposed to "affirmative action" and he believed that "compulsory integration" was just as wrong as "compulsory segregation." We find that these letters and others urged the Commissioners to oppose the Baldwin House proposal at least in part because they did not want black people moving into subsidized housing in Birmingham.

The Baldwin House proposal and three incumbent Commissioners were defeated at the April 3, 1978 election. Messrs. York, Jackson and Kain, the opposition candidates, were elected. After the April election, Mayor Conrad publicly stated that those opposing the ballot question had played on the racial fears of the electorate and that the vote against Baldwin House was, at least in part, racially motivated. The

[8] At the November 28, 1977 Commission meeting, the "Committee To Put The Issue On The Ballot" read parts of this flyer in opposition to the Baldwin House proposal.

City's interference with the Baldwin House proposal culminated when on May 8, 1978, Commissioners Conrad, Dropiewski and Watt, the three remaining Commissioners who supported the Baldwin House proposal, were recalled from office. The three Commissioners elected on April 3, 1978 together with Commissioner Kelly appointed their replacements. This newly composed Commission never took any action to repair the damage its practices and policies had done to the negotiations between MSHDA and Baldwin House. Even though the new Commission was aware that Baldwin House wanted its contract extended at least until September 1978, it took no action. It would have served no purpose for Baldwin House to again request an extension; it knew it had no support on the new Commission. A city that had actively interfered with the Baldwin House/MSHDA negotiations could now preclude construction of racially integrated family housing in Birmingham by simply doing nothing.

We conclude that the City's interference with the Baldwin House plan to construct low-income family housing was, in part, racially motivated. Among the facts that lead us to this conclusion are the views expressed by a significant number of opponents of Baldwin House (uttered both on the public record and within the hearing of those who testified at trial); a Commission that knowingly pursued policies that appeased those who expressed these bigoted views; the opinion testimony of supporters of Baldwin House describing the motivation of their opposition; the unusual sequence of events leading to the contract amendments and the Commission's decision not to extend its contract with Baldwin House; the decision to conduct an advisory referendum on the Baldwin House proposal; the extreme hostility and persistence displayed by opponents of Baldwin House in their efforts to defeat its proposal; the defeat of three commissioners at the April 3, 1978 election and the subsequent recall of the remaining three commissioners who favored the Baldwin House proposal; and the fact that Birmingham was and still is a

virtually all-white community despite its longstanding open-housing ordinance.

The evidence establishes that Baldwin House was attempting to comply with MSHDA's 2-for-1 policy. Its application was being processed by MSHDA without encountering too much difficulty until the City became actively involved in the negotiations for low-income family housing. Prior to November 1977, the majority of the Commission supported the family housing requirement in order to obtain MSHDA financing. The City's interference in Baldwin House's affairs was limited to dictating the type of family housing to be provided. The Commission made it known that it preferred to rehabilitate existing houses to comply with MSHDA's family-housing requirement. In the beginning that interference was not based on racial considerations. However, in November 1977, and thereafter, the City knowingly took steps that would ultimately defeat the Baldwin House proposal. These steps included limiting the extension of the Baldwin House contract; prohibiting Baldwin House from acquiring family-housing sites; and, finally, refusing to extend the Baldwin House contract beyond May 1978. One effect of terminating the Baldwin House contract was to keep Birmingham a virtually all-white city. Had Baldwin House been permitted to build low-income housing in Birmingham, approximately 16% of all tenants would have been black, and the City's minority population would have more than doubled. This discriminatory effect was forseeable when the City terminated the Baldwin House contract.[9] After November 1977,

[9] Prior to trial, the government argued that it need only prove that the City's actions had a proscribed discriminatory effect. *See, e.g., Arlington Heights Housing Development Corporation* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (*Arlington Heights II*). However, following trial, the government abandoned its efforts to impose liability on the basis of discriminatory effects alone and sought to establish that defendant actually intended to discriminate on a proscribed basis. Proof of foreseeable consequences is some evidence of a racially discriminatory purpose. *Columbus Board of Education* v. *Penick*, 443 U.S. at 465.

every action the Commission took appeased the vocal opponents of the Baldwin House proposal, many of whom were motivated by a desire to exclude black people from the City and to maintain the City's virtually all-white character. The Commission knew that racial considerations were a motivating factor influencing many of those who opposed Baldwin House's proposal to build family housing. It nevertheless bowed to their wishes. We conclude, therefore, that the City is chargeable with racially discriminatory intent for the actions it took in November 1977 and thereafter to obstruct the construction of family housing.

When the Commission voted to subject the Baldwin House proposal to an advisory referendum, it did so for the sole purpose of appeasing racially motivated opponents of the proposal. This was a unique procedure in Birmingham. There had never been an advisory referendum before. The Commission knew that many of the Baldwin House opponents who were clamoring for a vote on the proposal were motivated in part by a desire to exclude black people from Birmingham. The members of the Commission received, read and discussed copies of flyers circulated in the City as well as communications from numerous citizens addressed to various commissioners. Therefore, they had knowledge of the community sentiments with respect to the Baldwin House proposal. We conclude that the City's decision to place the referendum on the ballot was motivated by a racially discriminatory intent.

We recognize that determining whether a racially discriminatory animus was a motivating factor behind the City's conduct "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." However, to establish the requisite intent, a plaintiff need not show that a discriminatory purpose was the sole motivation of the defendant's conduct. Rather, the discriminatory purpose need only be *a* motivating factor. *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 252, 265-266 (1977) (*Arlington Heights I*); *United States* v. *City of*

Parma, Ohio, 661 F.2d 562, 572 (6th Cir. 1981). Rarely can it be said that a governmental decision-making body operating under a broad mandate made a decision motivated by a single concern, or even that a particular concern was the "dominant" or "primary" one. In fact, it is because governmental decision-making bodies are properly concerned with balancing numerous competing considerations that courts are loathe to review the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been *a motivating factor* in a decision, this judicial deference is no longer justified. *Arlington Heights I, supra,* at 265-266. Courts will consider evidence that a decision-making body took certain actions knowing it would have a discriminatory effect. This is some evidence, which when considered with other relevant evidence, may well establish that the decision-making body intended to cause that effect. *Columbus Board of Education* v. *Penick,* 443 U.S. 449, 464-65 (1979); *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 536 n.9 (1979).

We agree that a finding of discriminatory intent may not be based solely upon the bigoted comments of a few citizens. A city cannot be found to have intended to discriminate unless it can be shown that racial considerations were a motivating factor among a significant percentage of those who were responsible for the city's conduct. *Arlington Heights II, supra* at 1292. The government need not prove that the Commission itself intended to discriminate on the basis of race in order to establish that the City acted with a racially discriminatory intent. In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizen. *United States* v. *City of Blackjack, Missouri,* 508 F.2d 1179, 1185 n.3 (8th Cir. 1974). Any other rule of law would

permit a legislative body to place its official stamp of approval on private racial discrimination. The Supreme Court has consistently struck down any such state action. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley* v. *Kramer*, 334 U.S. 1 (1947).

The defendant argues that courts may not examine the motivation of voters in a referendum. We disagree. It is true that our power to require a voter to explain how and why he/she voted is extremely limited. *See Arlington Heights, I, supra*, at 268. It is also true that a court may not enjoin a city from conducting a referendum simply because the referendum might provide the city with a vehicle to carry out racial discrimination. This is so because referenda are a legitimate part of the democratic process. *James* v. *Valtierra*, 402 U.S. 137 (1971); *Ranjel* v. *The City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970). But when the referendum has been conducted, we may examine the motivation of the electorate in order to determine whether a city has acted out of racially discriminatory motives. *Id.* at 325. When it adopted the Fair Housing Act, Congress clearly intended to subject the conduct of the people acting directly by way of referendum to the same scrutiny that courts apply to the acts of governmental decision-making bodies. We do not believe that Congress intended to permit cities to practice racial discrimination with impunity by the simple expedient of adopting all discriminatory policies by popular vote. The Supreme Court tacitly approved judicial scrutiny of the motivation of an electorate in *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969) stating:

> [I]nsisting that a state may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the fourteenth amendments. Nor does the implementation of this change

> through popular referendum immunize it. *Lucas* v. *Colorado General Assembly*, 337 U.S. 713, 736-37 (1964). The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

But see Kirksey v. *The City of Jackson, Mississippi*, 663 F.2d 659 (5th Cir. 1981). In any event, the April 1978 referendum was advisory and not binding on the Commission. Thus, by examining the motivation of those who voted in an advisory referendum, we are not scrutinizing the conduct of people acting in a legislative capacity. Rather, we examine the motivation of those who voted against the Baldwin House proposal simply to gather additional information concerning the basis of opposition to the proposal.

Following the referendum, the Commission failed to extend its contract with Baldwin House, despite a longstanding request from Baldwin House that it do so. By April 1978, four members of the Commission were openly opposed to the Baldwin House proposal. Racial concerns were a motivating factor behind the opposition of at least two of the four members of the majority faction. The fact alone may be sufficient to attribute a racially discriminatory intent to the City. Regardless of their personal views, all four members felt bound by the results of the April 3, 1978 referendum not to proceed with the Baldwin House proposal. They were aware that a significant number of the opponents of Baldwin House were motivated in part by a desire to exclude black people from the City. We find, therefore, that the City is chargeable with racially discriminatory intent in its failure to carry forward with the Baldwin House proposal after April 1978.[10]

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[10] The defendant relies primarily upon four cases to support its argument that it has not violated the Act: *Joseph Skillken and Company* v. *The City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *vacated on remand* 429 U.S. 1068 (1977), *reaffirmed on remand*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977); *Citizens Committee for Faraday Wood* v. *Lindsey*, 507

(Footnote 10 continued on next page)

We agree with defendant that the Fair Housing Act does not impose any affirmative duty upon governmental bodies to plan for, promote, or construct any type of housing. Allegations that a city made plans to construct low-income housing and later abandoned those plans are insufficient to state a claim for violation of the Act or the United States Constitution. *Acevedo* v. *Nassau County, New York*, 500 F.2d 1078, 1081-82 (2d Cir. 1974). However, the circumstances under which such plans are abandoned are relevant in determining whether a city acted with racially discriminatory intent. In *Acevedo*, the plan to construct housing was in its very preliminary stages at the time it was abandoned. In such a case, a court should be reluctant to find that the decision to abandon was motivated by discriminatory intent because the factual record is likely to be sparse. But where, as here, a plan to build low-income housing has undergone development over a number of years and is abandoned because of the unnecessary interference by the city, there will often be ample evidence allowing a court to determine whether a city acted with racially discriminatory intent.[11]

The City argues that it did nothing to interfere with Baldwin House's freedom to build senior-citizen housing on a

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(Footnote 10 continued from previous page)

F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974); *Acevedo* v. *Nassau County, New York*, 500 F.2d 1078 (2d Cir. 1974). None of these cases is relevant here because none involved a finding that the defendant had engaged in intentional racial discrimination. Moreover, the Sixth Circuit has recently cast doubt on the applicability of *Mahaley* and *Skillken* to suits brought under the Fair Housing Act. The court in *City of Parma, supra* at 574, a case brought under the Act, distinguished *Mahaley* by noting that it involved a suit brought under the Housing Act of 1937 and not the Fair Housing Act, and distinguished *Skillken* by noting that its holdings were not based upon a construction of the Fair Housing Act.

[11] Our analysis takes into account the fact that Birmingham, unlike *Acevedo*, did not abandon its own inchoate plan to construct family housing. Rather, Birmingham was being asked to play only a peripheral role (*see* fn. #5, *supra*) in a private group's plan to construct family housing and it then took action that interfered with that plan. In such a case, we should not hesitate to examine the motivation behind that interference.

properly zoned site other than the Baldwin School site or to build family housing without also building senior-citizen housing on the Baldwin School site. Even if the City's argument were factually correct, it misses the mark. We are concerned with one particular proposal put forward by Baldwin House. Although Baldwin House did not originally intend to build family housing, it later voluntarily agreed to do so in order to meet MSHDA requirements for financing. It would have complied with MSHDA's requirements, except for the City's interference. The issue for our consideration is whether the City's interference with the Baldwin House/MSHDA negotiations was racially motivated, not whether the City might have acted differently in response to some hypothetical plan by Baldwin House to build low-cost housing on other sites.

The City contends that the overriding concern among those who opposed Baldwin House was the belief that low-income housing would lower property values. The City argues that it is not a violation of the Act for citizens to oppose construction of low-cost housing based on their concern over lowered property values, *Skillken, supra,* at 881, and that the City has no responsibility under the Act to show that these concerns were justified. We agree with the City that whether the concerns regarding lowered property values were justified is irrelevant. The Fair Housing Act does not proscribe actions based upon undocumented fears. Rather, the Act proscribes actions taken because of the race, color, sex or national origin of persons seeking housing. We do not agree, however, that the Act protects the City's attempts to provide blanket protection to all those who based their opposition to Baldwin House on fear that property values might drop. In order to determine whether the Act has in fact been violated, we must determine the basis for the fear that construction of low-income housing might lead to a reduction of property values. No doubt some opponents of Baldwin House really believed that an influx of poor people, black or white, who might not maintain their property could cause property values in the City to decrease.

A city may well be within its rights to oppose low-income housing out of a desire to exclude all poor people; neither the Fair Housing Act nor the United States Constitution so far as we know prohibits discrimination on the basis of wealth. On the other hand, it is clear that a large number of opponents of Baldwin House based their opposition on a belief that an influx of black people would cause property values to decrease, either because they might not maintain their property or because the presence of black people would decrease the attractiveness of Birmingham to white people desiring to live in an all-white community. A city that takes steps to exclude black people violates the Fair Housing Act, regardless whether they do so out of a desire to protect property values and not out of any animus against black people generally. A person who attempts to prevent a black family from buying the house next door because the presence of a black family on the block will decrease property values violates the Fair Housing Act just as assuredly as a person who attempts to prevent a black family from buying the house next door because that person dislikes all black people. The evidence here establishes that a significant percentage of those who opposed Baldwin House out of fear that property values might decline, based their fears on the belief that an influx of black people into a community decreases property values. This is the basis of Commissioner Kelly's fears when he said "the history of HUD and these people is to destroy." In fact, Commissioner Ring testified that *a majority* of concerns expressed to him in private prior to the April 1978 referendum were to the effect that family housing would lead to an influx of black people into the City, and that, in turn, might lead to a reduction in property values. To the extent that the City acted as it did in response to such fears, the City violated the Fair Housing Act.

Finally, the City carefully points out that MSHDA had not agreed to issue its mortgage commitment, had not agreed that the Baldwin House proposal was even feasible for a mortgage loan, and had not agreed to accept the proposed mix of newly

constructed and rehabilitated housing. From this, the City argues that even if its interference with Baldwin House's plans to construct low-income housing was motivated in part by racial considerations, the result would be the same and, in such circumstances, there is no justification for judicial interference with the challenged decision. Although it is true that as of May 1978 MSHDA still had not finally determined that the Baldwin House proposal was economically feasible, the City did not submit evidence to establish that the Baldwin House proposal was not feasible and never would have been built in any event. Nor did the City offer evidence to establish that Baldwin House and MSHDA never would have agreed on an acceptable mix of new and rehabilitated housing to make up the required 75 units of family housing. On the other hand, there is evidence that Baldwin House's housing consultant and a MSHDA staff member both preliminarily determined that the proposal was economically feasible regardless of the mix employed. Moreover, MSHDA had enough confidence in the proposal to grant Baldwin House a seed loan. In the past, in almost all cases in which MSHDA granted a seed loan, the proposed housing was actually built. We find that the preponderance of the evidence establishes that, but for the actions of the City, Baldwin House's proposal would have become a reality. Accordingly, we conclude that, by acting to block the Baldwin House proposal, in part because of its desire to exclude black people from the City, Birmingham made housing unavailable to certain individuals on the basis of their race in violation of § 804(a) of the Fair Housing Act. We further conclude that the City interfered with the right of a group of persons to seek housing in Birmingham because of their race in violation of § 817 of the Act. Accordingly, we will enter judgment in favor of the plaintiff on the issue of liability.

IT IS SO ORDERED.

(s) Robert E. DeMascio
United States District Judge

Dated: May 3, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

Civil No. 80 70991

CITY OF BIRMINGHAM, MICHIGAN,
Defendant.

JUDGMENT

Appendix B

JUDGMENT

The court having previously entered a partial judgment on the issue of liability, and the court having afforded the parties a hearing on the issue of remedy,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED:

1) that the City of Birmingham, its Mayor, each of its Commissioners, the City Manager, all Officers and Employees of the City and all those acting in concert with them who have notice of this injunctive order are hereby permanently restrained from engaging in any conduct that interferes with Baldwin House's efforts to construct low-income family and senior citizen housing within the City of Birmingham;

2) that the City of Birmingham shall forthwith reinstate its contract with Baldwin House, dated December 6, 1976, except that such contract will be amended to provide Baldwin House with the option to purchase within two and one-half years from this date the southern portion of the Baldwin School site; the northern boundary of that parcel of land is the center line of vacated Martin Street; PROVIDED, HOWEVER, that the contract shall specify that Baldwin House may obtain upon its request an automatic extension of that contract for two, six-month periods; PROVIDED FURTHER, that Baldwin House shall obtain additional extensions by petitioning the court for an appropriate order extending the contract beyond the expiration date of the second six-month extension; PROVIDED FURTHER, that the contract shall specify that Baldwin House may, at its sole discretion, include some low-income family housing units as a part of any elderly housing complex constructed on the site;

3) that the City of Birmingham and all of its Officials and Employees above named shall take all reasonable affirmative steps to assist Baldwin House in its peformance under the

contract, including but not limited to assisting Baldwin House with applications filed by Baldwin House to obtain mortgage financing and/or grants for rent subsidies; locating appropriate sites within the City suitable for constructing low-income family housing; locating existing housing suitable for substantial rehabilitation; and granting Baldwin House's reasonable requests for zoning variances; Baldwin House shall be free to provide low-income family housing by substantial rehabilitation of existing housing and by the construction of new, single or multiple unit family housing;

4) that Baldwin House shall at all times remain frec to determine, with approval of the court, the number of low-income housing units to be constructed and to determine the ratio of low-income senior citizen units to low-income family units; PROVIDED, HOWEVER, that the ratio of family to elderly housing shall be consistent with the housing needs of those living and working in the Birmingham area, as determined by any Housing Assistance Plan (HAP) prepared or to be prepared by the City of Birmingham or by Oakland County; PROVIDED FURTHER, that such ratio shall also be consistent with criteria established by the Michigan State Housing Development Authority (MSHDA) and/or the Department of Housing and Urban Development (HUD);

5) that the City of Birmingham shall provide to residents of any housing constructed on the Baldwin School Site, reasonable access to the city-owned parking lot located north of the center line of vacated Martin Street; such residents shall be permitted to use the parking lot free of charge to the extent that such use does not interfere with the parking needs of adjacent land owners;

6) that if the contract between Baldwin House and the City is due to expire and Baldwin House has not succeeded in obtaining mortgage financing for construction of low-income family and senior citizen housing and has not obtained a commitment for rent subsidies, Baldwin House shall, through

counsel for plaintiff, petition the court for a hearing to determine alternative methods and sources for obtaining such mortgage financing and rent subsidies;

7) that any application filed by Baldwin House with MSHDA and HUD for mortgage financing and rental subsidies shall indicate that the application is being filed pursuant to a judgment entered by the court;

8) that the City of Birmingham shall act expeditiously upon any and all applications filed by Baldwin House for building permits, zoning variances and tax abatements in connection with Baldwin House's efforts to construct low-income family and senior citizen housing within the City of Birmingham;

9) that the City of Birmingham shall cooperate fully with any affirmative marketing campaigns undertaken by Baldwin House designed to induce blacks and members of other minority groups to apply for occupancy in the low-income housing so constructed;

10) that Baldwin House shall, through its housing consultant, file periodic reports (every 120 days) with the court and counsel detailing the progress being made in its effort to construct low-income housing in the City of Birmingham; such reports shall describe any problems and obstacles being encountered in the processing of any application filed to obtain necessary financing and/or in the construction of low-income housing;

11) that the court's jurisdiction in this matter shall be continuing to provide amendments to this Judgment as required in order to assure that low-income family and senior citizen housing is constructed by Baldwin House in the City of Birmingham.

In all other respects this Judgment shall be final.

Dated at Detroit, Michigan, this 27th day of May 1982.

(s) Robert E. DeMascio
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF BIRMINGHAM, MICHIGAN,
Defendant.

Civil No. 80 70991

MEMORANDUM

(Findings of Fact and Conclusions of Law)

Appendix C

MEMORANDUM

(Findings of Fact and Conclusions of Law)

The trial on the remedy issue began on May 24, 1982, as ordered in our May 3, 1982 Partial Judgment. As a result of the evidence produced at trial, we now enter the following Findings of Fact and Conclusions of Law.

The Michigan State Housing Development Authority (MSHDA) does not currently have a pending proposal for mortgage financing from Baldwin House. However, MSHDA will entertain a new application from Baldwin House seeking mortgage financing for both senior-citizen and family low-income housing. The funds that MSHDA had at one time earmarked for the Baldwin House proposal were rescinded in October 1978. The MSHDA no longer requires the construction of one unit of family housing for every two units of senior-citizen housing as a condition for processing applications for mortgage financing. Rather, the required ratio is now determined by assessing the housing needs of the area in which the proposed housing is to be constructed. Generally, housing needs are determined by reference to the Housing Assistance Plan (HAP) prepared by communities and counties in connection with the Community Development Block Grant Program. The MSHDA now has on hand $10 million in uncommitted funds which could be used for mortgage financing. The MSHDA has developed plans for a new bond issue which should raise an additional $50 million. These funds are available to finance a construction mortgage for Baldwin House. However, MSHDA does not have funds at the present time to provide rent subsidies for new housing units, and MSHDA will not provide mortgage financing for Baldwin House unless Baldwin House is able to obtain a commitment for such subsidies.

The United States Department of Housing and Urban Development (HUD) does not now have Section 8 funds

available for rent subsidies for newly constructed family housing, nor is it likely to have such funds in the immediate future. However, HUD does have funds under its Section 202 program to provide mortgage financing and rent subsidies for new housing for senior citizens and handicapped persons. All applications for Section 202 funds for Fiscal Year 1982 must be filed by June 30, 1982. At the present time, HUD has allocated funds for 287 units of Section 202 housing for the Eastern Michigan area. Thus, the prospects of Baldwin House obtaining financing for low-income family housing in the immediate future are bleak.

Ms. Lois Postum, the current President of Baldwin House, and Mr. Wendell Addington, its Housing Consultant, testified that Baldwin House has voted to continue to pursue its goal of providing both low income senior-citizen and family housing in the City of Birmingham. Our final judgment in this case is based in large part on our belief that Baldwin House can and will accomplish that goal.

While this case was pending, the City of Birmingham proceeded with its plans to construct a parking lot on the northern portion of the Baldwin School site, including all of vacated Martin Street. The City Commission, by votes taken on August 4 and September 29, 1980, established a special assessment district to finance the construction of that parking lot. Special tax assessments have been levied against 40 businesses in the vicinity of the parking lot. On September 29, 1980, the United States filed a motion for a temporary restraining order to enjoin such construction. We denied the motion on September 30, 1980. We made it clear at that time that any construction by Birmingham would be undertaken at its own risk, and advised counsel that the scope of any remedial order would not be affected by any action taken by Birmingham after the date on which this suit was filed.

Appendix C

Conclusions of Law — Remedy

The City of Birmingham contends that the nature of the violation limits the scope of the remedy which we may enter. *See Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). From that rule of law, the City jumps to the conclusion that the remedial power of this court is limited to the entry of an order requiring the City to renew its December 6, 1976 contract with Baldwin House. We disagree. After a trial at which the City was given a full opportunity to be heard, we held that the City violated the Fair Housing Act by obstructing Baldwin House's plan to build low income senior-citizen and family housing. We further held that but for the City's interference, the low-income housing *would have been constructed*. The evidence presented at the May 24, 1982 remedy hearing clearly established that a judgment limited solely to the renewal of the City's December 6, 1976 contract with Baldwin House would not result in the construction of low-income housing in Birmingham. We note in particular that far less federal and state funds are available for low-income housing today than were available in 1977-1978. When a city defaults in its obligations under the Fair Housing Act, a district court has broad power to order whatever remedy is necessary to restore the parties to the position they would have been in but for the City's default. Everything included in the final judgment we have entered is designed to ensure that the effect of the City's violation of the Fair Housing Act is completely eradicated. It will be eradicated only when the low-income housing, which the City blocked unlawfully, is finally built. Unlike the district court in *Milliken*, we are not ordering any innocent third parties to bear the burden of our remedial order.

The City of Birmingham properly contends that under its City Charter it required voter approval for the sale of a portion of the Baldwin School site to Baldwin House. The City also contends that the referendum approved by the voters on April

5, 1976 authorized the sale of the site for the purpose of constructing "senior citizen housing and related purposes." The City contends that the terms of that referendum prohibit Baldwin House from constructing any type of housing other than senior-citizen housing on the Baldwin School site. Assuming for the sake of argument that low-income family housing is not "related" to low-income senior citizen housing, we still believe that the City's argument lacks merit. If Baldwin House finally acquires control of the Baldwin School site, it will be as a result of this court's final judgment, not as a result of the April 5, 1976 referendum. Thus, it makes no sense to suggest that Baldwin House is bound by the terms of that referendum. The City cannot hide behind a provision in its City Charter in order to frustrate possible remedies for the City's violation of the Fair Housing Act. Baldwin House is free to include low-income family housing within any housing complex it develops for senior citizens on the Baldwin School site.

The United States has asked the court to enter a broad remedial order requiring the City to establish a comprehensive program to encourage the development of low-income housing within the City of Birmingham. We believe that such a remedial order is not warranted by the violations of the Fair Housing Act found to have occurred in Birmingham. All the violations that have occurred were the result of opposition to a single low-income housing plan proposed by Baldwin House. The United States did not demonstrate that the City of Birmingham has been engaged in a continuing practice of prohibiting all low-income housing construction for the purpose of excluding blacks from the City. *Cf. United States* v. *City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, _____ US _____, 50 U.S.L.W. 3836 (April 19, 1982). In the absence of such a showing, we believe that an order requiring the City actively to promote a wide range of low-income housing programs, beyond that which was planned by Baldwin House, is unwarranted. Furthermore, monitoring

such a court order would be extremely difficult. We believe it far more preferable where, as here, the violation of the Fair Housing Act was limited to one housing proposal and where there are citizens within the community willing and eager to assist in remedying that violation, to structure a remedy that utilizes those citizens to the maximum extent possible and which limits the court's involvement to the minimum level necessary to ensure that a violation of federal law is corrected.

Finally, the City of Birmingham argues that the court has abused its discretion by going forward on May 24, 1982 with the remedial portion of this trial without giving the City an adequate opportunity to discover precisely the remedy which the United States is seeking. We believe that our refusal to countenance further delay in this suit is a proper exercise of our discretion. The City has had ample notice of the remedy the United States would seek. In its complaint filed more than two years ago, the United States asked the court to issue an injunctive order requiring the City to do everything necessary to undo the damage done by the City's alleged violation of the Fair Housing Act. The United States would have had difficulty being more specific regarding the remedy sought, since it had no way of knowing precisely what government funding programs would be available at the date on which the trial reached the remedial stage. Counsel could easily have anticipated that the United States would seek the broad remedial order it has suggested but that in the final analysis it would be for the court to enter an appropriate remedial order.

Counsel for the City of Birmingham has been a formidable advocate. He has consistently displayed a complete knowledge and understanding of the facts and law applicable in this case. He is fully aware of the remedies fashioned by other courts for violations of the Fair Housing Act. We believe, and counsel knows, that the complaint filed by the United States was clearly sufficient to place the City of Birmingham on notice that a finding of liability would result in an order requir-

ing the City to permit others to construct a low-income housing complex comparable in size to that originally proposed by Baldwin House, or even an order requiring the City to undertake such a project itself. However, counsel for the City has elected to steadfastly adhere to his proposal that the court's remedial order should be limited to reinstating the Baldwin House contract to permit construction of elderly housing only, a proposal we cannot accept. And so it is that the City of Birmingham, so far as we know, has not considered a suggestion we attempted to make at oral argument; a suggestion that the City also consider selling Baldwin House an additional portion of the Baldwin School site known as the "Panhandle" (approximately 113′ × 110′) for construction of low-income family housing. Although it is true that adjacent property owners have an interest in most of the land north of vacated Martin Street, they have no such interest in the "panhandle." There is much to commend this suggestion. For example, use of the "panhandle" for construction of family housing may very well satisfy the required ratio between the number of units of low-income family housing to units of senior-citizen housing; it could eliminate the necessity to acquire sites in other areas of the City; it may very well expedite approval for mortgage financing; it could, through proper architectural design, complement and enhance the senior-citizen complex; and, finally, it could eliminate the need to amend the judgment to consider other sites or other methods of financing.

Supplemental Findings of Fact to
May 3, 1982 Memorandum Opinion

1. The defendant City of Birmingham is a city of approximately 22,000 located in Oakland County, six miles north of Detroit, in the Eastern District of Michigan. According to the 1980 Census, .2% of its citizens (44 out of 21,689) are black persons. According to the 1970 Census, .1% of its citizens in 1970 (18 out of 26,170) were black persons.

2. According to the 1980 Census, black people constitute 4.7% of the population of Oakland County (47,962 out of 1,011,793). According to the 1970 Census, black people constitute 18.0% of the population of the Detroit Standard Metropolitan Statistical Area (757,083 out of 4,199,931).

3. In 1973, the City purchased from the Birmingham Board of Education the former Baldwin School site located at Chester and Merrill Streets. City officials anticipated that a portion of this property would be used for the development of senior-citizen housing.

4. The City purchased the Baldwin School site with assistance from Jacobson's Stores Realty Company under the terms of a 1973 agreement.

5. Jacobson's provided financial assistance with the understanding that a portion of the property would be developed as a parking lot. Although the 1973 agreement called for construction of the parking lot on all portions of the property north of the center line of vacated Martin Street, Jacobson's later acquiesced to the inclusion of the south half of vacated Martin Street, as well as a small parcel of land north of the centerline of vacated Martin Street, known as the "panhandle," in any senior-citizen development. Jacobson's has subsequently been reimbursed for its initial investment.

6. At the time of the April 5, 1976 referendum to approve the sale of the Baldwin School site to Baldwin House, very few Birmingham residents were aware that MSHDA might require Baldwin House to construct low-cost family housing in addition to senior-citizen housing. However, as early as September 1975, MSHDA asked the City to provide MSHDA with information concerning the City's plans to build "family housing." It is clear that the Commission knew of MSHDA's requirements for financing construction of elderly housing.

7. Members of the Commission, as well as other City Officials, were also aware prior to the April 5, 1976 referen-

dum that MSHDA required minority-occupancy goals to be set for all MSHDA-funded projects.

8. Prior to the April 5, 1976 referendum, the question of minority-occupancy goals for the senior-citizen housing was not a major topic of public discussion. Literature distributed by the City prior to the vote made no mention of such goals. However, those who attended public hearings on the sale would have known that Baldwin House was required to establish minority-occupancy goals.

9. In 1976, the City applied for participation in the § 8 Existing Housing Program to obtain rent subsidies for low-income families. The application had a twofold purpose: 1) to ensure HUD's willingness to allow Birmingham to participate in the Block Grant Program; and 2) to satisfy MSHDA's desire that communities building senior-citizen housing also provide housing assistance for low-income families. Mr. Leonard Watchowski, the City's Grants Administrator, contacted MSHDA officials on several occasions in 1976. He inquired whether the City's participation in the § 8 Existing Housing Program would satisfy MSHDA's balanced housing policy, but there is no evidence that he was so informed by MSHDA.

10. The Commission expressed hope in 1976 that MSHDA might also view the City's participation in the § 312 Program as an additional indication that the City was attempting to meet the housing needs of low-income individuals other than senior citizens.

11. Baldwin House retained the services of Mr. Wendell Addington to assist it in obtaining financing from MSHDA and authorized him to deal with MSHDA on its behalf. Mr. Addington, a housing consultant with extensive experience in the development of subsidized senior-citizen and family housing, knew in early 1976 that MSHDA objected to financing of senior-citizen housing for communities that were unwilling to construct family housing and that had not previously ad-

dressed the housing needs of low-income individuals other than senior citizens. He passed his knowledge along to other members of the Baldwin House Board.

12. Anticipating MSHDA's possible requirement for new construction of family housing, Mr. Addington located vacant sites in the City which appeared suitable for construction of family housing.

13. Mr. Addington wrote to MSHDA on July 15, 1976 to inquire whether Birmingham's participation in the § 8 Program would obviate any requirement that Baldwin House's loan request include a proposal to construct family housing. Mr. Addington had not received a written response to this letter when he submitted an official proposal to MSHDA on behalf of Baldwin House for elderly housing only on August 6, 1976. The proposal called for the development of 152 units of senior-citizen housing on a portion of the Baldwin School site. A letter accompanying the proposal stated that Birmingham land costs were too high to permit the inclusion of family housing as part of the proposal.

14. The MSHDA informed Baldwin House on September 21, 1976 that the City's participation in the § 8 Program would not satisfy MSHDA's balanced housing policy, and that Baldwin House's loan application would not receive further consideration until the application was amended to provide for family housing.

15. While it is true that MSHDA officials informed Baldwin House on September 1, 1977 that tax abatement of the entire project, including the family housing, would be required, they later decided that tax abatement on the family units was not necessary to maintain the economic feasibility of the overall package. Later reports and analyses of the proposal by MSHDA assumed that Baldwin House would pay full property taxes on the family housing. City officials understood that Baldwin House would pay property taxes on the family-housing units.

16. On February 25, 1977 Baldwin House proposed to MSHDA that it would satisfy MSHDA's balanced housing policy by constructing 50 units of new subsidized family housing on a site on Maple Road, with possibly eight to ten additional units on a small site on Lincoln Street. The zoning code would have permitted such construction. Both sites were for sale and obtainable by Baldwin House. Mr. Addington concluded that the combined proposal for senior citizen and family housing was economically feasible.

17. The MSHDA had discovered that while many communities were eager to build senior-citizen housing, few communities wanted low-income family housing. The MSHDA's balanced housing policy was designed to induce communities to accept family housing by offering senior-citizen housing as a "carrot." The MSHDA told communities that they had a free choice in deciding whether to accept funding from MSHDA.

18. In March 1977, MSHDA officials informed Mr. Watchowski that, as part of its newly announced balanced housing policy, MSHDA would require one unit of low-income family housing to be provided in the City of Birmingham for every two units of senior-citizen housing as a condition to its funding the senior-citizen housing complex proposed by Baldwin House. The MSHDA officials made clear that the 2 for 1 ratio was open to negotiation.

19. The MSHDA's application of its 2 for 1 policy to Birmingham was not based on a determination that Birmingham residents or those working in Birmingham either needed or wanted low-income family housing. Rather, it was based on MSHDA's desire to build equal numbers of senior-citizen housing units and family housing units throughout the state.

20. On March 31, 1977, while touring the City with Mr. White to determine whether sites were available that would be suitable for construction of new family housing under MSHDA criteria, Mr. Watchowski orally suggested a com-

promise to Mr. White for meeting the balanced housing requirement — the construction of 12 units of new housing on one site, 13 scattered-site units, and 25 units of § 8 Existing Housing already allocated to the City by HUD.

21. At its May 12, 1977 meeting, the commission passed a resolution directing Baldwin House to explore the possibility of meeting the balanced housing policy through the acquisition and rehabilitation of existing housing in the City. The Baldwin House Board adopted a resolution agreeing to pursue this possibility.

22. On July 18, 1977 the commission directed Baldwin House to apply to MSHDA for funding for senior-citizen housing with a proposal to supply "50 single-family, scattered site rental units" to meet the balanced housing requirement.

23. On July 28, 1977 Alice Burlingame, President of Baldwin House, amended the proposal which Baldwin House had submitted the previous August, in order to include plans for 50 detached houses to be acquired and rehabilitated by Baldwin House.

24. On August 11, 1977, MSHDA informed Ms. Burlingame that it would assign staff to review the proposal contingent upon the willingness of Baldwin House and the City to establish as a "working goal" the construction of 25 units of new family housing out of the 50 additional units needed to satisfy MSHDA's balanced housing policy. Ms. Burlingame replied on August 15, 1977 that the City had authorized Baldwin House to proceed with a proposal to supply 50 "single-family, scattered site rental units," that the program might require some new construction, and that "25 might be a goal" for new construction.

25. By letter of September 1, 1977, MSHDA informed Baldwin House that it had accepted the Baldwin House proposal for processing, subject to certain conditions, and requested that Baldwin House supply additional information

about the proposal and the development team. Acceptance of the proposal for processing meant that it had cleared a major hurdle — acceptance indicated that the MSHDA staff believed that the proposal had a reasonable chance of resulting in a completed housing project. The majority of proposals that MSHDA receives are not accepted for processing.

26. On September 14, 1977, Ms. Burlingame provided MSHDA with the information requested in its September 1 letter, including a copy of an unexecuted purchase agreement for a site for multiple-unit family housing on Lincoln Street. She also submitted a revised development proposal designed to meet the balanced housing requirement. The letter stated, "[S]ites will be optioned as soon as seed money loan funds are released." Mr. Addington was at that time prepared to recommend that Baldwin House option the Lincoln Street site when funds became available. The revised proposal provided for 25 single-family houses, 17 two-story town houses, and 8 two-story apartments.

27. Mr. Douglas Mernitz, MSHDA's Housing Development Officer assigned to handle the Baldwin House proposal, undertook a study of the financial feasibility of the combined proposal for 152 units of senior-citizen housing and 50 units of family housing (including the acquisition and rehabilitation of 25 existing single-family houses and the construction of 25 units of multi-unit family housing) and reported to MSHDA's Underwriting Committee on October 11, 1977 that the Baldwin House proposal was economically feasible. His study assumed no tax abatement would be granted for the family housing.

28. In a memorandum to Mr. White on October 20, 1977, Mr. Mernitz established the costs and projected income of a proposal for family housing in Birmingham consisting of 50 units of newly constructed single-family homes and a proposal consisting of 50 units of existing single-family homes that Baldwin House would acquire and rehabilitate. Mr. Mernitz

concluded that a proposal including senior-citizen housing on the Baldwin School site and either of the family housing proposals listed above would be economically feasible.

29. On October 25, 1977 a MSHDA Development Fund Loan Report recommended that MSHDA's Board approve a development fund loan of $83,000 for Baldwin House. The development fund loan program provides state loans for developments where there is a "reasonable anticipation" by the MSHDA Board that a mortgage loan commitment will be forthcoming. Approval of such a loan indicates that the MSHDA Board thinks the proposal has a great degree of feasibility. The loan is disbursed for such purposes as the preparation of plans or engineering studies, the acquisition of land, and other expenses that a sponsor might incur prior to the application for a mortgage loan commitment. Such a loan is known as a "seed loan." According to Mr. White, over 90% of units that went to the "seed loan" stage were eventually constructed. Mr. Addington testified that aside from Baldwin House, he never worked on a MSHDA proposal that received a seed loan and did not then proceed to construction. The October 1977 report on Baldwin House contemplated that the proposal would include 25 units of multi-unit family housing on two sites, 25 units of rehabilitated single-family housing, and a 152-unit senior citizen complex. The report also identified two sites for construction of family housing — Lincoln at Grant Street and Bowers at Elm Street — and stated that "as this proposal remains in preliminary stages of processing, specific units targeted for rehabilitation have not been identified." The report noted that despite several unique aspects of the proposal, including underground parking and the high cost of land in Birmingham, the proposal was projected to be economically feasibile. The staff recommended that the seed loan be used for several purposes, including the acquisition of options to purchase sites for the new construction of family housing.

30. The MSHDA continued to work on the Baldwin House proposal throughout the Winter of 1977-1978. However, MSHDA let it be known that it had reservations with regard to Birmingham's attempt to meet the family-housing requirement through rehabilitation of 50 single-family houses. Although MSHDA stated that its preliminary figures indicated that such a plan was feasible, it also stated that many preliminary assumptions remained untested and that continued economic feasibility was open to doubt unless part of the family-housing requirement was met through construction of multi-unit structures.

31. Following the defeat of the Baldwin House proposal in the April 4, 1978 referendum, MSHDA wrote to Baldwin House on May 23, 1978 to state that it had terminated processing of the Baldwin House proposal. At the time of termination, only $14,000 of the $83,000 seed money had actually been disbursed to Baldwin House. The issue of the precise method by which the 50-unit family housing requirement was to be met had not been resolved as of the date of termination.

32. Baldwin House did not require extensive assistance from the City in order to carry out its proposal for senior-citizen and family housing. Baldwin House needed only three things from the City: 1) the Baldwin School land on which to build senior-citizen housing; 2) a tax abatement for that land; and 3) certain zoning changes for the land.

33. The commission consistently sought to limit Baldwin House's independence in the area of family housing, even though Baldwin House was not seeking the City's assistance in carrying out the family housing segment of its proposal.

34. For example, in July 1976, City Manager Robert Kenning asked Mr. Addington for assurance that Baldwin House would inform the City of all sites it considered for the development of family housing. At a Baldwin House meeting on March 15, 1977, Mr. Staples (who was Mayor at the time) informed the Baldwin House Board that the commission op-

posed the construction of new subsidized family housing in Birmingham. At its May 12, 1977 meeting, the commission passed a resolution directing Baldwin House to explore the possibility of meeting the family-housing requirement through the acquisition and rehabilitation of existing houses. At its May 31, 1977 meeting the commission directed Baldwin House to file a proposal with MSHDA, which did not provide for newly constructed family housing. At its July 18, 1977 meeting the commission authorized Baldwin House to propose to MSHDA that the family-housing requirement be met by the acquisition and rehabilitation of 50 single-family homes.

35. In October 1977, the commission became concerned that Baldwin House had, without the commission's approval, agreed to construct new multi-unit family housing. The commission asked for, and received, from Baldwin House assurances that no such agreement had been made. The commission also wrote to MSHDA on October 12, 1977 to inform MSHDA that the commission had not "approved" construction of new multi-unit family housing by Baldwin House. On the same date Mr. Watchowski wrote to the Birmingham Housing Commission to make sure that the Housing Commission realized that the commission had made "no provision for new multiple family housing."

36. The original sale agreement between Baldwin House and the City required Baldwin House to receive MSHDA financing by December 6, 1977. At the time the agreement was drawn up, both parties understood that it might be necessary to extend that date. In October 1977, Baldwin House asked for a one-year extension.

37. The commission discussed the renewal of the Baldwin House contract on October 31, 1977 and tentatively agreed to a nine-month extension.

38. After opposition to Baldwin House's proposal surfaced, the commissioners began taking steps to delay processing of the Baldwin House proposal. At the November 7, 1977

meeting, the commission agreed to defer a final vote on a contract extension until November 28, 1977. The commission also added several amendments to the pending motion regarding the contract extension. One amendment prohibited either party from acquiring any single-family houses for the purpose of providing subsidized family housing until MSHDA had given its final approval for senior-citizen housing. Another amendment provided that the contract would terminate should MSHDA require Baldwin House to construct any multi-unit family housing.

39. Prior to the November 28, 1977 commission meeting, opponents of Baldwin House met at Seaholm School to organize their opposition. Commissioners Kelly and Ring attended. Mr. Kelly said that he opposed the Baldwin House proposal because he opposed the intervention of "big government" in Birmingham's affairs and because he did not want minority groups moving out to Birmingham.

40. Baldwin House and MSHDA continued to support a one-year extension of the contract between Baldwin House and the City. The MSHDA told the City that failure to extend the contract would kill the Baldwin House proposal entirely and thus that at the very least, Baldwin House should obtain a short contract extension.

41. A large and hostile crowd (much larger than the crowd of November 7, 1977) attended the November 28, 1977 city commission meeting. The great majority came to express opposition to the Baldwin House proposal. Ms. Elby presented a petition, signed by a very large number of Birmingham residents, asking the commission not to sign a contract extension and to place the issue of low-income housing on the ballot.

42. At the November 28, 1977 meeting the commission voted to extend the Baldwin House contract as amended for 60 days. Only Commissioner Kelly opposed the motion. The six commissioners who supported Baldwin House limited the extension to 60 days solely out of a desire to appease the

crowd. They realized that the amendments added to the contract could substantially impair Baldwin House's chances of receiving approval from MSHDA for its proposal. The commission also authorized the Housing Commission and other interested citizens to investigate alternatives to MSHDA financing for the development of senior-citizen housing.

43. Baldwin House and the City signed a 60-day contract extension on November 29, 1977, after the City informed Baldwin House that it was unwilling to sign a longer extension. The new agreement provided that the agreement would terminate if Baldwin House did not secure financing by February 6, 1978, unless the limitation was extended by mutual agreement. It also added a new paragraph H to the agreement which provided: "Baldwin House shall not take any steps toward acquiring any interest in or providing any type of housing other than Senior Citizen Housing." Baldwin House, in order to comply with paragraph H, terminated its efforts to find property for low-income family housing.

44. As explained in an open letter to Birmingham residents approved at the December 12, 1977 commission meeting by all commissioners except Mr. Kelly, the amendments added to the Baldwin House contract were a "compromise" intended to prohibit "Baldwin House from making any efforts to provide low- and moderate-income housing for non-elderly, thereby responding to the community concern as to the non-elderly low- and moderate-income housing."

45. At its February 6, 1978 meeting the commission extended the contract with Baldwin House for 90 days (to May 6, 1978), but left intact the amendatory restrictions which had been added to the contract on November 29, 1977. After receiving petitions and other requests from Birmingham residents, the commission discussed placing a question concerning MSHDA financing for senior citizen and family housing on the ballot for the City elections in April.

46. At several later meetings the commission discussed the proper wording for an advisory referendum on senior-citizen and family housing. During such discussions Mayor Conrad expressed concern about a ballot question of any kind on low-income or family housing. Because of the comments made at commission meetings and within the community, she thought that such a vote could be viewed as an expression of racial discrimination.

47. At its February 13, 1978 meeting the commission approved the following ballot question concerning the Baldwin House proposal:

> . . . . do you favor the construction by Baldwin House Corporation, of senior citizen housing on the Baldwin site, financed through the Michigan State Housing Development Authority, which financing requires the purchase and rehabilitation of up to 50 single family houses for rental to low and moderate income families, with rental subsidies for both types of housing provided by the Department of Housing and Urban Development?

It also approved a ballot question relative to financing of a senior-citizen proposal through a City bond issue. On February 21, 1978, the commission voted to place both questions on the ballot on April 3, 1978.

48. Mayor Conrad voted to place the question about the Baldwin House proposal on the ballot in hopes of resolving the "turmoil" that was going on in the community. Mr. Underwood voted to put the question on the ballot because people had continually asked the commission to do so.

49. The city commission was under no legal obligation to put any question concerning the Baldwin House proposal on the ballot. Furthermore, Baldwin House did not need a vote of the public to proceed with a proposal for any type of family housing.

50. There was no requirement that the commission take any action with respect to proposals to purchase single-family homes in the City or to build new multi-unit family housing developments on appropriately zoned sites.

51. Between the Spring of 1977 and the vote of April 1978, at the direction of the city commission, the Birmingham Housing Authority, an official city body appointed by the city commission, repeatedly reviewed alternative means of providing senior-citizen housing that would not involve MSHDA financing and its family-housing requirement. After each such review, the Housing Commission recommended that the City proceed with MSHDA financing and the Baldwin House proposal for senior citizen and family housing, as the only means by which Birmingham could provide low-income senior-citizen housing.

52. Mistrust of state and federal involvement was not a major concern of Birmingham residents. Most Birmingham residents knew very little about MSHDA and thus had no reason to mistrust the agency. Those who had worked extensively with MSHDA — primarily, members of the commission and Baldwin House — were occasionally frustrated by not knowing what MSHDA's balanced housing policy entailed. Yet, those individuals continued to support MSHDA financing of the Baldwin House proposal, despite their misgivings. Those in the City who claimed to mistrust MSHDA had little or no knowledge of the details of the negotiations among MSHDA, the City, and Baldwin House. Their dislike of MSHDA arose solely because of requirements that MSHDA was imposing on the City as a condition for financing senior-citizen housing. Furthermore, none of those claiming to mistrust state and federal involvement in local government ever spoke out against other programs under which the City received federal funds — such as HUD's § 312 program, its § 8 Existing Housing Program, and its Community Development Block Grant Program; MSHDA's Neighborhood Improvement Program; and federal revenue sharing. We find that no

significant opposition to the Baldwin House proposal was based on a principled belief that the City should not participate in state and federal aid programs.

53. A belief that low-income family housing should not be built in the City, regardless of the merits of such housing, without first being approved in a city-wide referendum, was not a factor of much independent significance among those who objected to the commission's handling of the Baldwin House proposal. There is no evidence that anyone who believed that such a vote was imperative actually supported Baldwin House. To the contrary, whose who argued the loudest that "the people" should be permitted to vote on the Baldwin House proposal — even though advisory referenda were rarely conducted in Birmingham — were also the most vocal opponents of Baldwin House.

54. While many concerns were expressed to the commission by opponents of the Baldwin House proposal, one concern which was repeatedly expressed was that the proposal would bring minorities to Birmingham. According to Mayor Conrad, in public discussions concerning the Baldwin House proposal, the subject of minority goals and quotas came up "over and over again." Concerns that were expressed about ninorities included how many minorities the Baldwin House housing would have as tenants, where in Birmingham these minorities would live, what type of minorities these persons would be, and whether they would take care of their property.

55. At public meetings at which Baldwin House was discussed, the concern Mr. Ring heard expressed most often was that construction of family housing would lead to decreased property values. Regardless of whether there was a factual basis for this fear, it was a very real fear among many Birmingham residents. However, the majority of concerns expressed to Mr. Ring in private were to the effect that family housing would lead to an influx of minorities into the City and that, in turn, might lead to a reduction in property values.

56. During the period of time during which the Baldwin House proposal was pending before MSHDA, Commissioner Robert Kelly expressed his opposition to the Baldwin House proposal on many occasions. While he stated various reasons for his opposition, such as the competence and financial ability of Baldwin House, the lowering of property values and "ruin" which low-income housing would bring to Birmingham, opposition to government interference in Birmingham, and alleged profit motivation of people involved with Baldwin House, Mr. Kelly never came forward with any information to substantiate any of the claims he made against the housing proposal.

57. Commissioner Kelly frequently expressed concern about the family housing aspect of the Baldwin House proposal and the people who might become tenants of the family housing. Mr. Kelly described the Baldwin House proposal as a "social experiment designed by social extremists" and viewed MSHDA as an agency attempting to impose its desired housing and living patterns on the public. Mr. Kelly talked about "those people" coming to Birmingham to live in the Baldwin House housing and ruining the City. He stated that the proposal would introduce "elements" into the City which people would not want.

58. In February 1978, Mr. Kelly spoke at a meeting sponsored by the Pembroke Manor Homeowners' Association for the purpose of discussing the Baldwin House proposal. During the discussion, Mr. Kelly talked about the predominantly black Brewster housing project in Detroit being torn down and stated: "You know where those people are coming; you don't want them to be your neighbors." He also spoke of a housing development in Berkley in which one-third of the occupants were citizens of Detroit and non-residents of Berkley.

59. The ballot question concerning the Baldwin House proposal was defeated in the April 3, 1978 election by a vote of 4,564 to 1,772. On the same date, three incumbent Commis-

sioners, Ring, Staples, and Underwood, were defeated in their bids for re-election; they were replaced on the commission by Jackson, Kain, and York. Commissioner Kelly was elected Mayor by the new commissioners.

60. In a special election conducted on May 8, 1978, three remaining incumbent commissioners who had supported Baldwin House — Conrad, Dropiewski, and Watt — were recalled from office. The remaining commissioners appointed replacements for the recalled commissioners.

61. Among those who pressured the city commission to put the referendum on the April 1978 ballot and who opposed extension of the Baldwin House contract with the City, who voted against the Baldwin House proposal in the referendum, who voted against the three incumbent city commissioners in the April 3, 1978 election, and who voted in favor of the recall of three other city commissioners on May 8, 1978, opposition to the construction of low-income family housing was the single most important motivating factor. A significant portion of those opposing family housing were motivated in part by a desire to prevent an influx of black people into Birmingham. Commissioners were aware that racial concerns played a significant part in the opposition to Baldwin House.

62. After the elections in April and May 1978, the new commission took no action to advance the Baldwin House proposal. The new commission was aware that Baldwin House wanted its contract with the City extended. It was also aware that in the Fall of 1977, Baldwin House had asked that the contract be extended until December 1978.

63. Mr. Kelly's failure following the April 1978 election to act on Baldwin House's request was based on his opposition to construction of any low-income housing in Birmingham. That opposition was based in significant part on his desire to exclude from Birmingham because of their race, those black people who would live in any housing constructed by Baldwin House.

64. Co. ·missioner York was elected on a platform of opposition to the Baldwin House proposal. During the campaign, he stated that he opposed construction of low-income housing in Birmingham because he believed that such construction would create an economic and social mix which was "biologically wrong." We find, based on his statement, that Mr. York opposed the Baldwin House proposal at least in part because he opposed the integration of black people into Birmingham. We find, also based on his campaign statement, that once on the commission, York failed to carry forward the Baldwin House proposal at least in part because of his opposition to the integration of black people into Birmingham.

65. Commissioners Jackson and Kain were elected on a platform of opposition to the Baldwin House proposal. Once on the commission, they failed to cooperate with Baldwin House.

66. Mr. Jackson's and Mr. Kain's failure to respond to Baldwin House's request for a contract extension to December 1978 was based in part on their personal opposition to the construction of low-income family housing and in part on their desire to carry out the mandate of the April 1978 referendum. They were aware that a significant portion of opponents of Baldwin House were motivated in part by a desire to exclude black people from the City.

67. Following the April 1978 referendum, key City officials, including City Manager Robert Kenning, have continued to feel bound by the results of the referendum, not to pursue state or federal government financing for senior-citizen housing. In a memorandum to the city commission, dated November 28, 1979, Mr. Kenning said, "Under current community restrictions it would be difficult to provide any subsidized housing." "Current community restrictions" referred to the votes that occurred in April 1978.

68. Following the referendum, Mr. Kelly Sweeney, City Assessor and Mr. Leonard Watchowski's successor as City

Grants Administrator, represented the City in meetings with HUD officials to discuss the City's continued participation in the Community Development Block Grant Program. HUD conditioned Birmingham's continued participation on a willingness by the City to provide both senior-citizen housing and low-income family housing. In Mr. Sweeney's view, taking the steps required by HUD for participation in the Block Grant Program should have been contrary to the April 1978 vote. Mr. Sweeney also believed that it was the general consensus among members of the commission that any attempt to comply with HUD's requirements would be contrary to the April 1978 referendum.

69. Since 1973, MSHDA has required all developers receiving funds to submit an "affirmative marketing" plan prior to actual disbursement of funds. The plan is required in order to ensure that all income-qualified citizens, regardless of race, religion, or national origin, have an equal chance to take advantage of subsidized housing opportunities. The plan must outline steps that will be taken to "market" the housing among target minority groups and must set "goals" for minority occupancy.

70. Had the Baldwin House proposal progressed as scheduled, Baldwin House would have had to submit an affirmative marketing plan, both for the senior-citizen housing and for the family housing. All parties agree that the Baldwin House goal would have been approximately 12-16%. However, Baldwin House had received assurances from MSHDA that those living or working in Birmingham could be granted a preference in housing placement. Demand for subsidized housing among Birmingham residents (virtually all of whom are Caucasian) was and is substantial.

(s) Robert E. DeMascio
United States District Judge

Dated: June 9, 1982

APPENDIX D

No. 82-1559

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CITY OF BIRMINGHAM, MICHIGAN,
Defendant-Appellant.

APPEAL from the United States District Court of the Eastern District of Michigan, Southern Division.

Decided and Filed February 8, 1984

Before: MERRITT, Circuit Judge; PHILLIPS, Senior Circuit Judge; and SPIEGEL, District Judge.*

PHILLIPS, Senior Circuit Judge. This fair housing case was filed by the Civil Rights Division of the Department of Justice against the City of Birmingham, Michigan, charging that the City had prevented the development of racially integrated low-income senior citizen and family housing by Baldwin House, a private corporation, in violation of the Civil Rights Act of 1968 (the Fair Housing Act). 42 U.S.C. §§ 3604 (a) and 3617.[1]

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* The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

[1] **§ 3604. Discrimination in sale or rental of housing**

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavail-

(Footnote 1 continued on next page)

Appendix D

In an opinion containing comprehensive findings of fact, District Judge Robert E. DeMascio issued an injunction restraining the City from interfering further with the efforts of Baldwin House, a non-profit corporation formed by members of five different Birmingham churches, to construct low-income family and senior citizen housing within the City of Birmingham.

Reference is made to the opinion of the district court, published in 538 F. Supp. 819 (E.D.Mich. 1982) for a detailed recitation of pertinent facts. We affirm the judgment of the district court except for one modification of the injunction as hereinafter set forth in part VI of this opinion, *infra*.

I

Birmingham, a suburb of Detroit, Michigan, has a population of approximately 22,000, with a very small minority ratio. According to the 1980 federal census only forty-four (0.2%) of its citizens were black. The City of Birmingham was aware of an acute shortgage of senior citizen housing as early as 1969. Attempting to meet this need, in 1975, after competitive bidding, the City accepted a proposal submitted by Baldwin House by which the City would sell to Baldwin House a recently acquired school site. The proposal called for the construction and management of 156 units (later reduced to 152) of senior citizen housing on the former site of the Baldwin

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(Footnote 1 continued from previous page)

ble or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

§ 3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

School. Baldwin House proposed to finance construction through the Michigan State Housing Development Authority (MSHDA) and planned to seek tenant rent subsidies under the Section 8 program of the Department of Housing and Urban Development.

The sale required voter approval. At a referendum held April 5, 1976, the voters of the City overwhelmingly approved the sale of the Baldwin School site to Baldwin House. The district court found as follows:

> On December 6, 1976, Birmingham entered into an agreement for the sale to Baldwin House of the former Baldwin School site. Paragraph I(G) of the agreement provided:
>
> > The City acknowledges that federal and state policy requires that non-elderly government assisted housing as well as assisted elderly housing be provided in each housing market area. Therefore, the City agrees it will consider such existing, rehabilitated and/or *new housing* as the Michigan State Housing Development Authority and/or U. S. Department of Housing and Urban Development shall reasonably require as a condition of providing financing and assistance to the Baldwin House project.
>
> The agreement gave Baldwin House one year to obtain MSHDA financing. Thus, prior to signing the agreement, the City Commission knew that MSHDA would require some "family housing" as a condition for financing the construction of senior-citizen housing. City officials also knew that MSHDA would probably require some new construction of family housing.
>
> On February 25, 1977, Baldwin House submitted its first request to MSHDA for financing the construction of family housing (50 units on one site with a possible additional 10 units on a second site). In March 1977, less than

> 90 days after the City signed its agreement with Baldwin House, MSHDA officials informed Mr. Watchowski, the City Grant Administrator that, as part of its newly announced balanced housing policy, MSHDA would require one unit of low-income family housing for every two units of senior-citizen housing as a condition for financing construction of senior-citizen housing.

538 F. Supp. at 822 (footnotes omitted).

After numerous developments described in detail in the district court's opinion, 538 F. Supp. at 822 to 824, the district court found that "Soon after the public had been advised that Baldwin House intended to construct low-income family housing, opposition began to surface. Most of the opposition to the proposal centered on fears that family housing might introduce 'harmful elements' into Birmingham." 538 F. Supp. at 824. Opposition to low-income housing was expressed at meetings of the City Commission. Flyers were distributed throughout the City, vigorously attacking the Baldwin House plan. The district court found that "[r]esidents who opposed the Baldwin House proposal attended every Commission meeting between November 1977 and April 1978"; and that they expressed concern about "those people" coming to Birmingham. *Id.* The court concluded: "We find that when the group led by Nancy Elby referred to 'those people,' they were referring to black people." *Id.* The court found that the City Commission took action that supported opponents of the Baldwin House proposal by agreeing to defer a final vote on extending the Baldwin House contract and by adding several admendments to the proposed contract that made it impossible for Baldwin House to continue its negotiations successfully with MSHDA. *Id.* at 825.

An advisory referendum on the Baldwin House proposal was held on April 3, 1978, when three of the seven members of the City Commission stood for reelection. The Baldwin House proposal and the three incumbent Commissioners were de-

feated. Three candidates opposing the proposal were elected. The district court found:

> The City's interference with the Baldwin House proposal culminated when on May 8, 1978 . . . the three remaining Commissioners who supported the Baldwin House proposal were recalled from office. This newly composed Commission never took any action to repair the damage its practices and policies had done to the negotiations between MSHDA and Baldwin House. Even though the new Commission was aware that Baldwin House wanted its contract extended at least until September 1978, it took no action. It would have served no purpose for Baldwin House to again request an extension; it knew it had no support on the new Commission. A city that had actively interfered with the Baldwin House/MSHDA negotiations could now preclude construction of racially integrated family housing in Birmingham by simply doing nothing.
>
> 538 F. Supp. at 826.

The district court held that "the City's interference with the Baldwin House plan to construct low-income housing was, in fact, racially motivated." *Id.*

Judge DeMascio then articulated seven specific factors in support of his conclusion. These seven factors are set forth in the quotation in Part IV of this opinion, *infra*.

We find the conclusion of the district court on these seven factors to be supported by the record. Reference is made to the findings of fact of the district court for comprehensive details of evidence supporting the court's conclusion on these seven factors.

II

The City urges reversal of the judgment of the district court on the following grounds:

(1) The findings of fact upon which the district judge based his ultimate conclusion that the City blocked the Baldwin House development with a racially discriminatory intent is based upon hearsay evidence and are clearly erroneous;

(2) That the district court unlawfully inquired into the motives of voters who participated in the April 3, 1978 advisory referendum on the sale of the Baldwin school site to the Baldwin House group;

(3) That the district court erred in holding that the City acted with a discriminatory intent is erroneous and contrary to law; and

(4) That the remedy prescribed by the district court is not limited to the nature of the violation found.

We address each of these contentions in turn.

III

This court may set aside findings of fact of a district judge sitting without a jury only if the findings are "clearly erroneous." Fed. R. Civ. P. 52 (a). To set aside such findings of fact, we must be left, after reviewing the entire record, "with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), *reh'g denied* 333 U.S. 869 (1948). In making a decision as to whether a mistake has occurred, this court defers to the district court's determinations with respect to the credibility of witnesses. "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

In a recent case also involving racial motivation of public officials in withdrawing support for a low-income housing project, *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1064-1065 (1982), the Fourth Circuit wrote:

> Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this. The trial court, in making findings of fact, was faced with the same problems confronting trial courts everywhere sitting as finders of fact in cases involving racial discrimination.

We conclude that the city's contentions that the findings of the district court are based upon hearsay testimony and are "clearly erroneous" are without merit.

IV

The City also contends the district court erred by examining the motivation of voters who opposed the Baldwin House proposal in the nonbinding referendum held April 3, 1978. We do not read the opinion of the district court as dependent upon the motivation of voters in this referendum for its decision. The facts enumerated by the district judge in support of his conclusion that the City interefered with the Baldwin House plan were the following:

> We conclude that the City's interference with the Baldwin House plan to construct low-income family housing was, in part, racially motivated. Among the facts that lead us to this conclusion are the views expressed by a

> significant number of opponents of Baldwin House (uttered both on the public record and within the hearing of those who testified at trial); a Commission that knowingly pursued policies that appeased those who expressed these bigoted views; the opinion testimony of supporters of Baldwin House describing the motivation of their opposition; the unusual sequence of events leading to the contract amendments and the Commission's decision not to extend its contract with Baldwin House; the decision to conduct an advisory referendum on the Baldwin House proposal; the extreme hostility and persistence displayed by opponents of Baldwin House in their efforts to defeat its proposal; the defeat of three commissioners at the April 3, 1978 election and the subsequent recall of the remaining three commissioners who favored the Baldwin House proposal; and the fact that Birmingham was and still is a virtually all-white community despite its longstanding open-housing ordinance.
>
> 538 F. Supp. at 826.

Racial motivation of voters in the referendum is not articulated in this paragraph as one of the critical factors. The court stated the basic issue in the case to be "Whether the city's interference with the Baldwin House/MSHDA negotiations was racially motivated," 538 F. Supp. at 830; and, notwithstanding any racially discriminatory motives on the part of voters, the court found that numerous actions of city officials which restricted and finally terminated those negotiations were based on racially discriminatory considerations. This statement of the issue is not erroneous and the district court's findings on this issue are not clearly erroneous. We affirm the District Court's decision on this basis and on the basis of the seven factors enumerated in the above-quoted paragraph. We therefore do not find it necessary in this opinion to pass upon the issue of whether a district court may make a judicial examination of the motivation of voters in an advisory referendum election.

V

We further conclude that the district court did not err in holding that the City acted with discriminatory intent in blocking the Baldwin House proposal. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) sets forth the standards against which official conduct may be weighed in attempting to determine whether that conduct was motivated by a discriminatory purpose. "[O]fficial action will not be held unconstitutional *solely* because it results in a racailly disproportionate impact. 'Disproportionate impact is *not* irrelevant, but it is not the sole touchstone of invidious racial discrimination.' " 429 U.S. at 265, *quoting Washington* v. *Davis*, 426 U.S. 229 (1976). (emphasis added). The Court in *Arlington Heights* went on to say:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

429 U.S. at 265-66 (footnotes omitted).

The City further contends that the judgment of the district court is erroneous because "it is not limited to the nature of the violations found." For example, the City asserts the district court exceeded its authority by permitting Baldwin House to "obtain additional extensions" of the contract for sale of the Baldwin School site by petitioning the court. We hold this provision is not an abuse of discretion. After automatic extensions expire, the district court, on the application of Baldwin House, may examine the circumstances that have prevented the sale of the land and determine whether or not a further extension is proper. The injunction does not commit the district court to grant a further extension. It merely leaves the door open to insure that appropriate efforts can be expended to make whole the victims of the City's discriminatory conduct.

It is well established that flexibility is proper in the successful shaping and supervision of an equitable decree. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, *reh'g denied* 403 U.S. 912 (1971); *United States* v. *City of Parma*, 661 F. 2d 563, 576 (6th Cir. 1981).

With the exception of the modification of the injunction set forth above, the judgment of the district court is affirmed. No costs are taxed. The parties will bear their own costs in this court.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. CIVIL ACTION NO. 80-70991

CITY OF BIRMINGHAM, MICHIGAN,
Defendant.

ORDER AMENDING JUDGMENT OF MAY 27, 1982

Pursuant to the February 8, 1984 decision of the United States Court of Appeals for the Sixth Circuit in this litigation, Paragraph 1 of the May 27, 1982 Judgment in this action is hereby amended to read:

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED:

(1) that the City of Birmingham, its Mayor, each of its Commissioners, the City Manager, all Officers and Employees of the City and all those acting in concert with them who have notice of this injuctive order are hereby permanently restrained from engaging in any conduct because of race or with discriminatory motive on account of race that interferes with Baldwin House's efforts to construct low-income family and senior citizen housing with the City of Birmingham.

In all other respects, this Court's May 27, 1982 Judgment shall remain the same.

Dated at Detroit, Michigan this 11th day of April, 1984.

(s) ROBERT E. DEMASCIO
United States District Judge

(2)

No. 83-1822

Office-Supreme Court, U.S.
FILED
JUL 12 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF BIRMINGHAM, MICHIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the finding of the district court, affirmed by the court of appeals, that the City of Birmingham, Michigan, acted with racially discriminatory intent in blocking the development of low-income housing is clearly erroneous.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 10

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 8

Berenyi v. *Immigration Director*, 385 U.S. 630 ..... 6, 9

Palmore v. *Sidoti*, No. 82-1734 (Apr. 25, 1984) 9

Personnel Administrator v. *Feeney*, 442 U.S. 256 9

United Jewish Organizations v. *Carey*, 430 U.S. 144 9

United States v. *Reliable Transfer Co.*, 421 U.S. 397 ..... 6, 9

Statutes and rule:

Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.* :

§ 804(a), 42 U.S.C. 3604(a) 2

§ 817, 42 U.S.C. 3617 2

Fed. R. Evid. 801(c) 9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50a-60a) is reported at 727 F.2d 560.[1] The district court's memorandum opinion and judgment (Pet. App. 1a-24a) are reported at 538 F. Supp. 819. Its supplemental findings of fact and conclusions of law (Pet. App. 26a-49a) are unreported. The district court's order amending its judgment (Pet. App. 60a) also is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1984, and the petition for a writ of certiorari was filed on May 4, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

---

[1]Petitioner omitted one page from the court of appeals' opinion in the appendix to the petition (App., *infra*, 1a-2a). The omitted page is reprinted as an appendix to this brief and follows Pet. App. 58a.

STATEMENT

1. The United States filed this action on May 7, 1980, alleging that petitioner ("the City" or "Birmingham") had, for racial reasons, engaged in conduct intended to prevent a private corporation (Baldwin House) from developing racially integrated, low-income housing, in violation of Sections 804(a) and 817 of the Civil Rights Act of 1968 (the Fair Housing Act), 42 U.S.C. 3604(a) and 3617 (Pet. App. 2a).

Trial on the issue of liability lasted from August 24, 1981, until October 1, 1981. On May 3, 1982, the district court rendered a detailed opinion holding that Birmingham had blocked Baldwin House's efforts because of its desire to exclude black people from the City, in violation of 42 U.S.C. 3604(a) and 3617 (Pet. App. 1a-20a). After two days of hearings on the question of remedy, the court, on May 27, 1982, entered an order enjoining the City from interfering further with the Baldwin House project and requiring it to cooperate with Baldwin House's efforts to develop housing (*id.* at 21a-24a). On June 9, 1982, the court filed supplemental findings of fact and conclusions of law (*id.* at 25a-49a).

The court of appeals affirmed the judgment of the district court, but, on the request of the United States and the City, modified the district court's injunction making it clear that the City is prohibited from interfering with Baldwin House's development of housing only if the interference is based on racial grounds (Pet. App. 50a-59a; App., *infra*, 1a-2a).

2. The facts, as summarized below, are taken primarily from the district court's opinion and supplemental opinion on liability (Pet. App. 1a-20a, 31a-49a), which were not disturbed by the court of appeals. Birmingham is a suburb of Detroit, Michigan. According to the 1980 census, .2% of Birmingham's 22,000 residents are black (*id.* at 31a). Aware of its acute need for senior-citizen housing, in the summer of

1975, the City accepted the proposal of the Baldwin House Corporation to purchase the Baldwin school site for construction of 156 units of publicly-assisted senior citizen housing. Because sale of the school site required voter approval, the City held a referendum in April 1976 at which the voters overwhelmingly approved the sale. The City subsequently entered into a contract with Baldwin House that allowed it one year to obtain financing. *Id.* at 2a-3a & n.2.

Baldwin House thereupon sought financing from the Michigan State Housing Development Authority (MSHDA) and was informed that MSHDA would require development of one unit of low-income family housing for every two units of senior citizen housing. After exchanges of proposals, Baldwin House, on September 1, 1977, finally submitted a proposal that MSHDA accepted for processing. On October 25, 1977, MSHDA approved an $83,000 development loan for the Baldwin House project. Pet. App. 3a-6a.

Opposition to the proposal arose shortly after the announcement that Baldwin House intended to include low-income family housing in its proposal to MSHDA. One City Commissioner, Robert Kelly, openly equated nonresidents of Birmingham with members of minority groups and opposed their movement into Birmingham. Pet. App. 6a-7a. A vocal group, led by Nancy Elby, began to appear at City Commission meetings and to demand submission of the Baldwin House proposal to an advisory referendum.[2] One City Commissioner felt constrained to

---

[2]As a result of this pressure, the Commission adopted a series of amendments to the agreement to sell land to Baldwin House. Principal among these were provisions that the contract would terminate if MSHDA required Baldwin House to construct multi-unit family housing and that Baldwin House could not take any steps toward providing anything other than senior citizen housing. Pet. App. 8a.

warn Elby that her opposition could appear to be motivated by a desire to exclude black people from Birmingham. *Id.* at 7a-8a. Nevertheless, the City Commission eventually agreed to submit the proposal to an advisory referendum in April 1978, at the same time that three Commissioners who supported the proposal would stand for reelection (*id.* at 9a).

The Commission and referendum campaign bore racial overtones. One opposition candidate, for example, stated at a public meeting that the Baldwin House proposal would create an economic and social mix that was "biologically wrong." Pet. App. 9a. A campaign flyer stated that the Baldwin House proposal would bring in "non-residents" and noted that priority would be given to "16% minorities" (*ibid.*). Citizen opposition to Baldwin House, as communicated to the City Commissioners in correspondence and in private conversations, also revealed racial animus. Letters to City Commissioners opposed dwellings " 'being reserved for blacks when there was not a black child in the school system' " and any " 'requirement that the City artificially alter the population makeup of the community so as to provide a diverse population pool' " (*id.* at 10a). One Commissioner testified that a majority of the concerns expressed to him in private prior to the April referendum were to the effect that family housing would lead black people to come to the City and reduce property values (*id.* at 19a).

At the April 1978 referendum the proposal was rejected and the three Commissioners who had stood for reelection were all defeated by the opponents of Baldwin House. Shortly thereafter, the remaining three Commissioners who had supported Baldwin House were recalled from office and replaced by opponents of the proposal who were appointed by the remaining Commissioners. Pet. App. 10a-11a.

3. Based on these facts, the district court concluded and the court of appeals agreed that Baldwin House would have constructed low-income housing had it not been for the interference of the City, and that the City's interference was motivated, in part, by a desire to exclude blacks from Birmingham. The court found that the Commissioners' actions beginning in November 1977 were designed to appease racially motivated opponents of Baldwin House. Pet. App. 12a-13a. The court further concluded that, following the April 1978 election, at least two City Commissioners opposed Baldwin House because of their desire to exclude minority citizens from Birmingham. Thereafter, the contract for sale of the land was allowed to lapse. Pet. App. 16a.

Citing, inter alia, the following, the district court held that race was a significant motivating factor in the City's interference with Baldwin House: (1) public statements voiced by opponents of Baldwin House; (2) opinion testimony of supporters of Baldwin House describing the motivation of the opposition; (3) the unusual sequence of events leading to the contract amendments and the refusal to extend it; (4) the decision to invoke the extraordinary procedure of submitting the proposal to an advisory referendum; (5) the ouster from office of all Commissioners who supported Baldwin House; and (6) the virtually all white character of Birmingham (Pet. App. 11a-12a).

The district court concluded that the United States had established the City's discriminatory intent by showing that the City Commission acted for the purpose of effectuating the desires of private citizens, who were motivated in their opposition to the Baldwin House project in part by race and whose racial motivations were made known to the Commission members and were permitted to influence the Commission's decision (Pet. App. 13a).

4. The court of appeals affirmed the district court's findings of fact, rejecting petitioner's contention that they were based on inadmissible hearsay (Pet. App. 55a-56a). The court of appeals found it unnecessary to determine whether it was proper for the district court to examine the motivation of voters in the referendum, since the district court's finding of intentional racial discrimination was supported without reliance on the referendum (*id.* at 56a-57a). The court of appeals also affirmed the district court's holding that the City had acted with discriminatory intent and, finally, affirmed the remedy, with the modification requested by both the United States and petitioner (see page 2, *supra*).

ARGUMENT

Petitioner acknowledges (Pet. 18) that it is asking this Court to review findings of fact made by the district court and undisturbed by the court of appeals. Indeed, the City suggests (Pet. 21-23) that this Court disregard its well-established two-court rule (see *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967)) and re-evaluate the weight to be accorded to exhibits and to the live testimony of witnesses. There is, however, no occasion for the Court to abandon its well settled practice of not reviewing findings of fact concurred in by both courts below — findings that are in any event fully supported by the record. Since petitioner's remaining contentions also lack merit, further review is not warranted.

1. Petitioner argues (Pet. 8-12) that the finding that it acted with racially discriminatory intent is erroneous because the City offered nondiscriminatory grounds for its actions, which the United States failed to establish were pretextual. We note first that the City is asking this Court to review a finding of intentional discrimination in which both lower courts concurred. Moreover, the City's contention is

simply erroneous. The principal "non-discriminatory reason" offered by the City for its interference with the Baldwin House project was fear that low-income housing would lower property values (see, *e.g.*, Pet. 9). While the district court assumed (Pet. App. 19a) that "[a] city may well be within its rights to oppose low-income housing out of a desire to exclude all poor people," it nevertheless specifically found (*ibid.*):

> The evidence here establishes that a significant percentage of those who opposed Baldwin House out of fear that property values might decline, based their fears on the belief that an influx of black people into a community decreases property values.

See also *id.* at 7a.

A second significant "non-discriminatory reason" offered by the City was fear of outsiders (Pet. 9). The district court explicitly found the term outsiders, however, to be a code word for minorities (see, *e.g.*, Pet. App. 6a-7a). The City also contends (Pet. 9) that resentment of minority occupancy goals was a non-discriminatory basis for blocking the Baldwin House project. Again, however, the district court found that, in the circumstances of this case, the campaign against minority occupancy goals was part of an effort to block the Baldwin House proposal because it would increase the number of black people in Birmingham (Pet. App. 9a). The district court, therefore, directly addressed the most significant of the City's assertedly neutral justifications for its actions and found them to be either pretextual or unpersuasive. The court of appeals correctly found the district court's findings fully supported by the evidence. Moreover, the district court found that but for the actions of the City, which it found to be motivated by race, the Baldwin House project would have been built (Pet. App. 20a). The courts below thus concurred in findings, fully

supported by the evidence, that amply satisfy the requirements of *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 n.21 (1977). Petitioner's contention (Pet. 10-12) that the decision below creates a conflict in the circuits thus is unsupported and does not mask the fact that it is simply asking this Court to review a finding of fact.

2. Petitioner also contends (Pet. 12-16) that it was error for the district court to inquire into the motivation of voters who opposed Baldwin House in the April 1978 referendum. As the court of appeals stated, however, such inquiry was not essential to the finding of discriminatory motive (Pet. App. 56a-58a). Indeed, while the referendum was one factor among a totality of circumstances discussed by the district court (see page 4, *supra*), as the court of appeals noted (Pet. App. 57a), it was not identified "as one of the critical factors." Because the court of appeals based its affirmance solely on factors other than the motivation of the voters in the referendum, it found it unnecessary "to pass upon the issue of whether a district court may make a judicial examination of the motivation of voters in an advisory referendum election" (*ibid.*). The issue, therefore, is not properly presented for review by this Court.

3. Petitioner further suggests (Pet. 17) that it was insufficient for the district court to find that the City Commission blocked the Baldwin House proposal to appease citizens who were motivated by race. A finding, however, that governmental action was taken to effectuate the policies of racially motivated private citizens can be sufficient to establish discriminatory intent.[3] As this Court recently stated in

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[3]We note that the district court found that two members of the City Commission themselves were motivated by racial animus in their opposition to Baldwin House (see pages 3, 5, *supra*).

Palmore v. *Sidoti*, No. 82-1734 (Apr. 25, 1984), slip op. 4:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

The overwhelming evidence in this case that opponents of Baldwin House were motivated by racial prejudice and orchestrated a campaign against Baldwin House based on race and that the City Commission took a series of actions in direct response to this campaign fully supports a finding that the City's action was taken " 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979) (quoting *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (1977) (concurring opinion) (footnote omitted)).

4. Finally, the City contends (Pet. 18-23) that the finding of discriminatory intent was based on weak evidence and, therefore, is clearly erroneous. As noted above (page 6, *supra*), petitioner is thus asking this Court to reevaluate the weight to be accorded live testimony and witnesses and, ultimately, to review and reject a finding of fact concurred in by two courts. Such an effort would be a misuse of this Court's limited resources. *United States* v. *Reliable Transfer Co., supra*; *Berenyi* v. *Immigration Director, supra*. In any event, the City's hearsay arguments are facially spurious and were properly rejected by the court of appeals.[4]

---

[4]For example, petitioner contends (Pet. 19-20) that the flyers opposing the Baldwin House proposal upon which the district court relied (Pet. App. 9a-10a) were inadmissible because they were hearsay. As petitioner acknowledges (Pet. 19-20), however, the flyers were not introduced to show the truth of the statements they contained, but rather to demonstrate the motivation of a segment of Birmingham's population and to show that the Commission had knowledge of the racial attitudes exhibited by the flyers. Accordingly, the flyers were not hearsay. See Fed. R. Evid. 801(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1984

DOJ-1984-07

APPENDIX*

To assist courts in this inquiry, the Supreme Court has identified objective factors that may be probative of racially discriminatory intent: (1) the racial impact of an official action; (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision. *Arlington Heights, supra*, 429 U.S. at 266-267, 97 S. Ct. at 563-564. No single factor may be dispositive of this decision. In the present case we conclude that the district court did not err in deciding that the totality of circumstances establishes that the City of Birmingham blocked development of Baldwin House with racially discriminatory intent. The details of evidence supporting this conclusion are set forth in the opinion of the district court. 538 F. Supp. 819 *et seq.*

The United States and the City of Birmingham have agreed, both in their brief and in oral argument, that the district court exceeded its remedial authority by enjoining the City from engaging in "*any conduct*" that interferes with Baldwin House's efforts to construct low-income family and senior citizen housing within the City of Birmingham. The Government concedes that the injunction should be limited to prohibition of conduct *because of race*. The Government agrees that the City "should be left free to pursue legitimate interests, such as the enforcement of zoning ordinances and building codes, so long as their interests are not exercised with discriminatory motive."

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*See note 1, *supra*.

We agree with the Government's concession. Accordingly, it is ORDERED that the first paragraph of the judgment of the district court reported at 538 F. Supp. 831, be and hereby is amended by inserting after the words "from engaging in any conduct" the words "because of race or with discriminatory motive on account of race."